91-788

NO._____

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

RANDY ARDEN FRIEOUF,

Petitioner,

v.

UNITED STATES OF AMERICA,
FARM CREDIT BANK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. May the bankruptcy court, or any other court, permanently or temporarily, lawfully disqualify, for any cause it deems sufficient, all existing dischargeable debts from discharge, pursuant to 11 U.S.C. 349(a)?

2. May the bankruptcy court deny the discharge of debts on the basis of bad faith?

3. Must the bankruptcy court obey the Code provisions relating to dischargeability (i.e. Code Sections, 11 U.S.C., secs. 1141 and 523) when determining "cause", and limit itself to the grounds contained therein?

4. May the Court of Appeals exercise original jurisdiction to impose new restrictions on Debtor that were never

at issue below and upon which there was never a hearing?

5. Does the Court of Appeals Opinion devolve excessive, unreasonable and unlawful powers on the bankruptcy court in violation of due process guarantees in Amendment 5 to the Constitution of the United States, and in violation of Article I, section 1 of the Constitution?

6. Does the conduct of Debtor warrant denial of discharge of all presently dischargeable debts, for a period of three years, and may such conduct lawfully be the grounds for such a denial?

LIST OF PARTIES

The parties to this appeal are as follows:

The Petitioner is Randy Arden Frieouf, a farmer who has sought protection under Chapter 11 of the Bankruptcy Code.

His attorney is William L. Needler, whose name and address appears on the front of this petition.

The Respondents are the United States of America and one of its agencies, Farm Credit Bank. The United States is represented by Kay Sewell, Asst. U.S. Attorney, 200 N.W. Fourth Street, Room 4434, Federal Courthouse Building, Oklahoma City, OK 73102; (405) 231-5281. The Farm Credit Bank is represented by G. Blaine Schwabe, III, Kevin M. Coffee of Mock,Schwabe, Waldo, Elder, Reeves & Bryant, 211 N. Robinson, 15th Floor, One Leadership Square, Oklahoma City, OK 73102; (405) 231-5281.

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The Petitioner, Randy Arden Frieouf, the debtor in this case, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above proceeding on July 10, 1991. Should the judgment of the

Court of Appeals for any reason be deemed interlocutory, Debtor submits that such is still reviewable pursuant to the Forgay v. Conrad doctrine (Forgay v. Conrad, 47 U.S. 201, 205-6). Should the Court of Appeals Opinion and Order in the case not be deemed to constitute a judgment for the purpose of review, then Petitioner requests this Court to exercise its original jurisdiction and issue a writ of mandamus compelling the Tenth Circuit Court of Appeals to modify its Opinion and Order so as to prevent irreparable harm to Petitioner and all others similarly situated.

OPINIONS BELOW

The July 10, 1991 opinion of the Court of Appeals for the Tenth Circuit has been published, and appears as In re Randy Arden Frieouf, Debtor; Frieouf v.

United States, et al., 938 F. 2d 1099 (10th Cir. 1991). The Court of Appeals Opinion also appears at A 2, et seq.[1] No rehearing was requested, as neither the Petitioner, nor his counsel can afford the expense of futile additional further proceedings below, the object of which are to foreclose the Debtor. Also, the extreme importance of the issues addressed here to all debtors, now and in the future, compels immediate application to this Court.

The district and bankruptcy opinions are unreported. The district court's opinion appears here at A 30. The bankruptcy court's Order On Motions to Dismiss appears at A 40; and the bankruptcy court's Order of Dismissal

[1]A stands for the Appendix attached to this Petition.

Appears at A 62.

JURISDICTION

Federal jurisdiction over the bankruptcy proceedings below is conferred by Title 11, United States Code (the Bankruptcy Code),and arises under 28 U.S.C., sec. 1334 and sec. 157. Petitioner appealed the order of the bankruptcy court dismissing this case with prejudice to any refiling under the Bankruptcy Code for a period of three years, pursuant to 28 U.S.C., sec. 1334 and 158. The District Court affirmed the bankruptcy court's opinion and Petitioner then took an appeal to the Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C., sec. 158(d).

The Court of Appeals reversed, and held that the bankruptcy court had the power to permanently or temporarily

disqualify a class of debts from discharge upon dismissal of a bankruptcy case, and accordingly it was fair for the Court of Appeals to temporarily deny discharge of all of the debts that could be discharged in debtor's Chapter 11 case for a period of three years. The Court of Appeals reversed and remanded the district court's order only "to the extent it affirms the judgment of the bankruptcy court denying debtor all access to the bankruptcy court beyond 180 days for debts not related to this case." The Court of Appeals, however, "AFFIRMED the order of the District Court to the extent that it affirms the bankruptcy court's judgment dismissing the case, but only insofar as it temporarily denies debtor a discharge of the debts dischargeable in this case for

a three year period. It is this so-called "affirmance" that debtor asks this Court to set aside. It is believed that the statute that confers jurisdiction upon this Court to review by way of certiorari decisions of the Court of Appeals in matters of this kind is 28 U.S.C., sec. 1254(1).

STATUTES INVOLVED

This case involves the scope and meaning of Bankr. Code, 11 U.S.C., sec. 109(g) and 349(a), which appear verbatim in material part at A. 13-14. The case also involves recognition of Bankr. Code 11 U.S.C., secs. 523 and 727.

STATEMENT OF THE CASE[2]

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[2]Unless otherwise noted, the facts set forth are undisputed and are supported by the bankruptcy court docket in this case (to be forwarded to this Court along with the rest of the record below.

On September 20, 1985, Debtor Frieouf filed his Chapter 11 petition, seeking to reorganize as a farmer thereunder.[3] On October 7, 1985, Debtor filed his Schedules, and also filed a motion for use of collateral, which was subsequently granted on October 28, 1985.

On October 28, 1985, Debtor applied to appoint counsel which was granted on November 13, 1985.

On October 29, 1985, Federal Land Bank (now Farm Credit Bank) applied for relief from stay for its two loans to debtor, and on November 27, 1985, Debtor responded.

On December 3, 1985, the Bankruptcy

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[3]No creditor has challenged Debtor's status as a farmer, however, the district court states that there is nothing in the record to establish this fact, but, of course, that is not true. The Farm Credit Bank would hardly be in this case if Debtor were not a farmer.

Court granted relief from stay to Federal Land Bank on its two loans because of Debtor's failure to comply with the timing for response required by local rule.

On December 11, 1985, the Bankruptcy Court struck Debtor's Response to Federal Land Bank's Motion for Relief from Stay, and Debtor appealed on December 13, 1985.

Between December 13, 1985 and June 25, 1987, other creditors attempted to secure relief from stay so that they would be in the same position as Federal Land Bank with varying minor degrees of success.

On June 10, 1986, Debtor filed his plan of reorganization.

On June 25, 1987, the United States District Court for the District of Oklahoma, reversed the Bankruptcy Court and

vacated the two orders granting Federal Land Bank relief from Stay on its loans.

On June 30, 1987, Federal Land Bank filed a Motion to Dismiss, and on July 8, 1987, the FmHA (this entity has also been changed, but is represented then as now by the United States).

On July 28, 1987, the Federal Land Bank requested a hearing on its Motion for relief from stay.

On August 14, 1987, an agreed order for adequate protection to the Federal Land Bank (FLB) was entered.

On September 15, 1987, Debtor filed his Amended Plan and Disclosure Statement.

On October 13, 1987, FLB withdrew its motion to dismiss.

On December 1, 1987, FLB objected to Debtor's Disclosure Statement, even

though it had settled and withdrawn its Motion for relief from Stay on August 31, 1987.

On January 20, 1988, unable to agree to value, FLB moved to determine the value of real property, and on February 29, 1988, a hearing on value was held and FLB was to submit an agreed order.

On April 15, 1989, FLB moved for relief from Stay and to reduce time for response so that it could offer restructuring to the Debtor; and on June 8, 1988 the Debtor was given permission to participate in this federal farm program, and the stay was relieved to permit this participation.

On September 30, 1988, FLB again moved to dismiss the Chapter 11 case and Debtor objected on October 21, 1988 with brief in support.

On December 13, 1988, the Court ordered agreed modification to the Disclosure Statement, but all three major creditors filed objections to the Plan and filed ballots rejecting it. Also a dispute as to land valuation arose on the property upon which Grant County Bank had a lien. (See transcript of proceeding of February 25, 1989, p. 6-8).

On January 25, 1989, the Bankruptcy Court held a hearing on the Plan, but there had been confusion as to whether the Disclosure Statement had been approved, since creditors' consent to the required modification could not be obtained. The confusion was no fault of debtors, and the confusion was shared. Kevin Coffee, attorney for Farm Credit Bank, at one point even informed debtor's counsel that there was no

hearing scheduled for January 25, 1989 (Tr. 1/25/89. p.15-18).

The bankruptcy court directed Debtors to respond in 9 days to the oral motion to convert the case to Chapter 7 and the motion to dismiss, with and without prejudice by Friday, February 3, 1989. (Tr. 1/25/89, p.26). The Court also directed the following:

> " I will receive this response on or before February 3. No further hearing will be set. No further pleadings will be filed until the motion to dismiss and the motion to convert have been acted upon by the Court.

Meanwhile, unbeknown to Mr. Truax, the attorney handling the Debtor's case, his law firm was experiencing extreme financial difficulties due to an unexpected inability of many farmers to pay for legal services. Mr. Truax's employment, of necessity, came to an end on February 15, 1989 when the downtown

Chicago offices of William L. Needler were closed. (See Motion to Reconsider and Vacate, etc. order on Motions to Dismiss and Motion to Reschedule the Show Cause Hearing, (p. 4-5). Where there were four lawyers before, there was now only one -- William L. Needler.

Nevertheless, before his departure, timely filed debtor's Objection to Motion to Dismiss, Objection to Request for Conversion and Brief on February 3, 1989, and requesting a hearing on the grounds of due process.

On February 14,1989, the Bankruptcy Court filed its Order on Motions to Dismiss (A. 40), holding that Debtor's dilatory and contumacious conduct over the course of the proceedings required dismissal with prejudice; that conversion to Chapter 7 would be denied on the

ground that a farmer cannot be liquidated; that the motions to dismiss, however, would be held in abeyance until a hearing on February 28, 1989, at which time the debtor was directed to show cause why the bankruptcy case should not have been dismissed under sections 349(a) and 109(g) of the Bankruptcy Code. The reason for this hearing, according to the bankruptcy court, was to give Debtor a fair chance to explain the conduct of the case in light of the Court's previously announced statement that dismissal with prejudice was not warranted in the case.

The bankruptcy court's order was received by the Needler firm in Chicago on February 16, 1989 when most of the staff had departed and Mr. Needler was out of town. The order could not receive his attention until Monday, February 20,

1989. Even so, Attorney Needler was able to put together a Motion to Reconsider, Vacate, ... and Modify the February 14 order. On February 25, 1989, it was discovered that Attorney Needler could not possibly journey all the way to Oklahoma to attend the show cause hearing on Tuesday, February 28, 1989, because of a scheduling conflict and an inability to leave Chicago for long at this critical time for the Needler firm. Debtor Frieouf could not be available either because of his mother's untimely death. Accordingly, on Sunday, February 26, 1989, Attorney Needler requested the bankruptcy court by Express Mail to postpone the hearing, which was received by it on February 27, 1989.

Nevertheless, the court went forward with the hearing on February 28, 1989,

dismissed the case with prejudice, denied the debtor's Motion to Reconsider and Vacate, etc., the order of February 14, 1989, and allowed Farm Credit Bank to submit cases in support of a dismissal with prejudice for three years.

On March 1, 1989, counsel for Farm Credit Bank submitted cases.

On March 8, 1989, the Bankruptcy Court dismissed this Chapter 11 proceeding for a farmer with prejudice for three years. (A 62 et seq.)

On March 20, 1989, an appeal to the District Court of the bankruptcy court's order was filed. On August 26, 1989, the debtor's requested an emergency stay pending appeal, which was denied. On December 29, 1989 the District Court, Ralph G. Thompson, Judge Presiding, affirmed the bankruptcy court (A 30 et

seq.)

On January 29, 1990, an appeal of the District Court's order was filed to the Court of Appeals. On July 10, 1991, the Court of Appeals reversed the district court's affirmance of the bankruptcy court's restriction of three years before debtor could file another bankruptcy proceeding, but imposed one of its newly-devised holdings that all debtor's presently dischargeable debts could not be discharged in another proceeding for three years. This petition seeks to reverse this holding and give debtor and all others similarly situated the opportunity of a fresh start.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS IMPERMISSIBLY LEGISLATED ADDITIONAL NON-DISCHARGEABILITY POWERS, AND HAS ERRONEOUSLY EXERCISED ORIGINAL JURISDICTION TO APPLY SUCH POWERS IN DEROGATION OF PROCEDURAL DUE PROCESS.

The Court of Appeals opinion, with all due respect, is very elusive and unclear.

First, the Court of Appeals agrees with Debtor that the statutory construction in such cases as Lerch v. Federal Land Bank, 94 Bankr. 998 (N.D. Ill. 1989) (which strains to give authority for looking beyond section 109(g) and for prohibiting all access to bankruptcy court for more than 180 days), raises serious constitutional concerns and is contrary to the language and punctuation used by Congress in 11 U.S. C., sec. 349

(a) and 109(g).

The Court of Appeals further notes that a prejudicial dismissal under section 349(a) must be premised on bad faith conduct, and erroneously finds that Debtor was guilty of such conduct. Its prior decision in Hall v. Vance, 887 F. 2d 1041 (10th Cir. 1989) is somehow supposed to give guidance even though that case had to do with prejudicial dismissal, and nothing to do with non-dischargeability of debt. Presumably the dicta of Hall would permit a prejudicial discharge for a period of no more the 180 days, although Hall was not such a case. The relevance is not clear.

According to the Court of Appeals:

> Accordingly, section 349(a), by its plain language, must be read as allowing a bankruptcy court, "for cause," to permanently disqualify a class of debts from discharge, but a

> bankruptcy court may not deny future access to bankruptcy court, except under the circumstances of section 109(g).

There is now, and never has been, any doubt that the bankruptcy court may permanently disqualify a class of debts from discharge -- but these debts must be of a certain specific kind and certain specific procedures must be followed.

If a creditor requests that the bankruptcy court deny the "global" discharge of all debts, his objection is governed by the particular Code section relating to the proceeding he has filed. In this Chapter 11 case, such objections would be governed by 11 U.S.C., sec. 1141. Section 1141 states in material part:

> (3) The confirmation of a plan does not discharge a debtor if--
>
> * * * *
>
> (C) the debtor would be denied a discharge under section 727(a) of

the Code.

Section 727(a) of the Code contains ten very specific grounds upon which a debtor may be denied his discharge (i.e. the permanent non-dischargeability of all his debts). These grounds do not include the picayune and minor items of procedural negligence alleged against debtor (actually debtor's counsel) in this case.

However, the Court of Appeals does not order a permanent denial of discharge of all debt. What it orders is a temporary discharge of debt for a time certain of a certain class of debt (or so it says).

An action to avoid the dischargeability of specific debts, or classes of debt, is controlled by Section 523 of the Code, and is initiated by the filing of a complaint by a creditor. Section 523 is

applicable to any Chapter under the Code. The action is an adversary proceeding and is governed by Rule 4007 and Part VII of the Bankruptcy Rules. Presumably, an action could be brought to avoid dischargeability of a class of debt, but the rules regarding class actions would then apply also. No such class action proceeding has taken place below, nor has it been determined just which creditors, if any, may have been prejudiced.

In any event, Section 523 lists twelve specific grounds whereby the dischargeability of specific debts or classes of debt may be avoided. The grounds recited by the Court of Appeals in this case are not among the grounds enumerated in Section 523.

The "for cause" to which Code Section 349(a) refers is a prior

adjudication of non-dischargeability under either Section 1141 or 523. Section 349(a) is merely the Code section that prevents already non-dischargeable debts from being asserted in a subsequent proceeding. Said another way, Section 349(a) allows the assertion of dischargeability of debt in a subsequent proceeding unless the court has found cause under Sections 1141 or 523 to deny dischargeability.

Under no circumstances, does 349(a) empower any court to refuse to discharge debt. As stated in the Historical and Revision Notes to Code Section 727:

> "This section is the heart of the fresh start provisions of the bankruptcy law. Subsection (a) requires the court to grant debtor a discharge unless one of nine conditions are met."

Would this Court really allow the bankruptcy court, or any other court, to add

to the Congressionally mandated list of conditions, either under Section 727 or 523, whereby the dischargeability of debt can be avoided? We think not. Certainly, never could a non- Article III court be endowed with such amazing powers.

The Bankruptcy Code must be read as a whole and not in isolated parts. See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989). The clear language of Section 349(a) states that the dismissal of a bankruptcy case does not bar the dischargeability of debt in a subsequent proceeding unless the bankruptcy court has found cause to order otherwise, and the only way the bankruptcy court can find such cause is through adjudications under Sections 1141 or 523. Congress has spoken loudly on

this point, and there is no room for "judicial interpretation."

But, even were Section 349(a) to be interpreted as the Court of Appeals would have it, it cannot exercise original jurisdiction of the bankruptcy court to adjudicate whether the so-called "bad faith" described by it is sufficient to cause the non-dischargeability of debt. There would have to be a trial or hearing in the bankruptcy court on that issue, and not a judgment based on borrowed findings regarding some other issue.

It is violative of due process for the Court of Appeals to decide to charge and convict the debtor of new offenses without a hearing below on the specific charge. Such is in derogation of the due process provisions of Amendment 5 to the Constitution of the United States.

A bankruptcy court, indeed no federal court, may exercise powers that are not specifically conferred by law. To permit the bankruptcy court, or any other court, to make up the law regarding the grounds upon which dischargeability may be denied would far exceed the limited jurisdiction conferred upon the federal courts by the Constitution and upon the bankruptcy courts by Article I, section I of the Constitution; also see Aldinger v. Howard, 96 S. Ct. 2413, 247 U.S. 1, 49 L. Ed. 276 (1976).

It is not enough to say that "nothing prohibits" the bankruptcy court from exercising its discretion, for there must be specific authority allowing and empowering the bankruptcy court to act. Section 349(a) does not empower the Bankruptcy court, or any other court, to

invent new grounds for the denial of dischargeability of debt in the face of the specific Code provisions that govern these matters.

The wrongful expansion of bankruptcy powers in this case far exceeds the impermissible grant of power in Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed 598 (1982), with devastating consequences for every bankruptcy litigant--for now with the bankruptcy court inventing grounds to deny dischargeability of debt the potential for abuse and corruption below is enormous. It is doubtful whether this Court will face a more important matter relating to bankruptcy and the debtor's fresh start.

II.

NEITHER DEBTOR NOR HIS COUNSEL WAS GUILTY OF BAD FAITH OR CONTUMACIOUS CONDUCT

It is curious that there was no real effort to accuse debtor of bad faith and contumacious conduct until the debtor announced that he proposed to file under Chapter 12 in the event the case was dismissed. As found by the bankruptcy court, this was the reason the creditors requested a prohibition on refiling for three years. A 64. In other words, it was only when bad faith had to be established to prevent a refiling that the creditors and the bankruptcy court "reviewed the record" to discover some bad faith.

There was, of course, no bad faith for the following reasons:

The debtor did not wait nine

months to file an initial plan of reorganization. The debtor was forced to wait. There is no specific time requirement for submitting a plan and disclosure statement.

The early stages of the case were consumed by dilatory motion practice of creditors seeking relief from the automatic stay. The bankruptcy court has neglected to mention, and so has the district court and the Court of Appeals, that the bankruptcy court granted relief from stay on a technicality to FLB. It was then necessary to pursue an extensive, unnecessary and expensive appeal. Of course, the results of the appeal would materially affect the debtor's prospects. No one moved to foreclose even in the absence of a stay pending appeal, so the better part of

valor was to await the decision of the district court.

The district court found in debtor's favor on June 25, 1987, over a year and one half after the filing of the petition. While Debtor filed a plan to indicate good faith at the nine month mark in the belief that an opinion from the district court would shortly be forthcoming, he could not file a disclosure statement because it would have simply been a useless and expensive exercise in futility with the decision of the district court unknown. Promptly on September 15, 1987, when the District Court decision was known, after the crops were in, and debtor's full story was clear, Debtor filed his Amended Plan and Disclosure Statement. There was no delay whatever except that caused by the

creditors. What then transpired, for the next year and one half, is related at pages 9 through 17 of this petition. None of these facts give rise to bad faith on the part of Debtor.

At no time did the creditors move to strike the Plan for failure of consummation, for everyone, including the Court, was hopeful that Debtor could reorganize by agreement of the parties. This was a case where selfish creditors demanded additional valuations as the farm economy improved. The creditors were not prejudice by any delay, they were materially assisted--and they were in fact the principal cause of delay.

It is clear that Debtor could reorganize under Chapter 12 because in that context his major creditors would not have been able to invoke the absolute

priority rule.[4] There could have been no more laudable result consistent with American principles of fair play, than to permit this case to be dismissed without prejudice so that Debtor could have refiled under Chapter 12 and thereby in due course satisfy all of his creditors.

Perhaps most egregious is the failure of the bankruptcy court to allow further time for a show cause hearing when the Needler firm was failing and had closed down its Chicago office. Anyone who has had to pick up the pieces of such a collapse would have great sympathy for those who were striving to make things right for all clients and would have made allowances. But that was not to be

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[4]The "absolute priority rule" permits large unsecured creditors to vote the unsecured portions of their claims so as to defeat any reorganization effort that does not satisfy them 100 percent.

because the creditors and bankruptcy court were looking for reasons to head off a refiling under Chapter 12. It is a pity they have succeeded so well.

It is untrue Debtor "disobeyed" court orders. Debtor does not have to "obey" court orders which he has obtained that are no longer viable because the circumstances have changed -- creditors wouldn't agree as indicated or promised. It is to be emphasized that the creditors were also present when any representations were made to the bankruptcy court.

It was alleged that failure to file monthly operating reports is a reason for prejudicial dismissal. However, the creditors neglect to mention that they didn't even notice their absence--for the simple reason that small farmers do not have the accounting capabilities that

other enterprises have, and there is little to report until the harvest is in and the profit is made. In Mr. Frieouf's case, however, a number of reports had been submitted to counsel--in the confusion at the Needler firm, they were thought to be copies of something the debtor had filed with the court. In the final stages of close-down there was more confusion as people departed the Needler firm without completing some of the tasks on hand, so that there was also a small delay in filing which the bankruptcy court expanded into a heinous offense.

None of the facts above have ever been disputed by the Respondents, for there is no rebuttal. The technique is to ignore the facts and tell half-truths.

It is, of course, irrelevant at this point what the allegations of bad faith

are because they are unproven -- the Court of Appeals has reversed and may not borrow findings below regarding another matter to infer bad faith sufficient to prevent the dischargeability of debt in another proceeding .

CONCLUSION

It would be a tragedy if the Tenth Circuit's Opinion were allowed to stand, for it radically alters the fresh start objectives of the Bankruptcy Code and makes dischargeability of debt a matter of bankruptcy court whim, rather than a matter of right, subject to clearly defined exceptions under the Code.

WHEREFORE, Petitioner requests this Court to grant his Petition and reverse that part of the Opinion and Order of the Court of Appeals that prevents Petitioner

from discharging any of his debts in a subsequent proceeding for a period of three years.

/s/ William L.Needler
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APPENDIX

Contents

OPINION OF THE TENTH CIRCUIT,
filed July 10, 1991.

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

In re: RANDY ARDEN FRIEOUF, Debtor.

No. 90-6036

RANDY ARDEN FRIEOUF, Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; FARM CREDIT BANK OF WICHITA, Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-89-1126t)

Submitted on the briefs:

William L. Needler of William L. Needler and Associates, Ltd. Ogallala, Nebraska (Bruce E. Hammer as Co-Counsel, Blackwell, Oklahoma), for Plaintiff-Appellant.

Timothy D. Leonard, United States Attor-

ney, Kay D. Sewell, Assistant United States Attorney, Oklahoma City, Oklahoma, for Defendant-Appellee United States of America.

G. Blaine Schwabe III, and Kevin M. Coffee, of Mock, Schwabe, Waldo, Elder, Reeves & Bryant, Oklahoma City, Oklahoma, for Defendant-Appellee Farm Credit Bank of Wichita.

Before McKAY, SETH, and SEYMOUR, Circuit Judges.

SETH, Circuit Judge.

Debtor Randy Arden Frieouf appeals a decision of the district court affirming the bankruptcy court's dismissal of his Chapter 11 petition with prejudice to the filing of any bankruptcy petition for three years.[1] Debtor poses numerous

[1]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

challenges to the decisions of the bankruptcy and district courts. In our view, the pivotal question presented is whether the bankruptcy court had authority to deny debtor all access to bankruptcy relief for a period of three years.

I.

Debtor filed the underlying petition on September 20, 1985. In its initial stages, litigation in this case consisted almost entirely of motions by various creditors seeking relief from the automatic stay of 11 U.S.C., sec. 362(a). Debtor's exclusive 120- day period to file a plan of reorganization expired without any action being taken by the debtor.

Debtor eventually submitted a plan on June 10, 1986. However, the plan was

not accompanied by a disclosure statement as required under 11 U. S. C., sec. 1125(b). The bankruptcy court, on August 4, 1986, ordered debtor to file a disclosure statement by August 20, 1986, but debtor did not comply.

On June 30, 1987, the Federal Land Bank of Wichita (FLB) filed a motion to dismiss citing 11 U.S.C., sec. 1112(b)(2) and (3). Among the alleged grounds for dismissal were debtor's failure to effectuate a plan of reorganization or file a disclosure statement as ordered by the bankruptcy court, and debtor's overall unwillingness to prosecute this case in an expeditious manner. The bankruptcy court on September 4, 1987, set a hearing for October 6, 1987, to consider FLB's motion to dismiss. In response, debtor

filed an amended plan of reorganization and a disclosure statement on September 15, 1987.

The October 6 hearing was held as scheduled and, at that time, FLB's motion to dismiss was withdrawn without prejudice to its being refiled. The bankruptcy court then set a hearing for December 8, 1987, to consider approval of debtor's disclosure statement. The December 8 hearing was also held as scheduled, and debtor was directed to amend his disclosure statement within thirty days, and FLB was given ten days to review such amended disclosure statement. If no objections was filed, an agreed order was to be presented and debtor's plan of reorganization was to be set for a confirmation hearing.

No agreed order was ever presented. Farm Credit Bank of Wichita (FCB), formerly FLB, refiled its motion to dismiss pursuant to section 1112(b) on September 30, 1988. As alleged grounds for dismissal, FCB reasserted debtor's inability to effectuate a plan of reorganization and unwillingness to prosecute this case. Debtor, again faced with a motion to dismiss, filed an amended disclosure statement and a third plan of reorganization on November 17, 1988.

A hearing was set for December 13, 1988, to consider debtor's amended disclosure statement and FCB's motion to dismiss. At that hearing, FCB's motion to dismiss was denied without prejudice. Debtor's disclosure statement was

modified and approved as modified, and debtor was ordered to mail his plan of reorganization and disclosure statement to creditors by December 30, 1988, with a hearing on confirmation of the plan to be held by January 25, 1989.

On January, 1989, FCB once again refiled its motion to dismiss pursuant to section 1112(b). At the January 25 hearing, it was disclosed that neither debtor's plan nor his disclosure statement was ever mailed to creditors. FCB's motion to dismiss, which was later joined by the Farmers Home Administration (FMHA), was taken under advisement, and debtor was given until February 3, 1989, to respond to that motion. Debtor was specifically directed to address whether a dismissal should be with or without

prejudice.

On February 14, 1989, the bankruptcy court entered an order in which it reviewed the procedural history of this case and concluded that there had been little or no apparent effort on the part of debtor to formulate a confirmable plan of reorganization. The bankruptcy court specifically noted that:

"It appears that the only plans which have been field have been filed solely to create an argument in opposition to various motions seeking to terminate the proceeding. The first plan was not even accompanied by a disclosure statement, and an approved disclosure statement is a necessary prerequisite to the solicitation of acceptances. 11 U.S.C., sec. 1125(b). The failure to file a disclosure statement continued, even after the court had ordered the filling of the same."

"The first amended plan of reorganization was accompanied by a disclosure statement, but after a hearing, when the court directed that the same be amended within thirty days, no further action was taken. The most recent disclosure statement and plan of reorganization were

filed 38 months after the initiation of these proceedings, and even after counsel for debtor was directed to transmit to creditors the plan and disclosure statement, as modified, no such transmittal was effected. Counsel now asserts that the court must convene a valuation hearing on certain of the debtor's assets and presumably must therefore once again convene a hearing to determine whether the disclosure statement should be approved, and, if approved, order a hearing on the confirmation of the plan. To date, there appears to be virtual universal rejection of debtor's proposed plan. This, after more than three years during which debtor's creditors have been prevented from exercising their rights with regard to claims against the debtor and his property by reason of the automatic stay."
Bankruptcy Court Order of February 14, 1989, at 5-6.

The bankruptcy court concluded that dismissal of this case with prejudice was warranted. Debtor, however, was given one last opportunity to show cause why dismissal with prejudice was not

justified.[2] FCB's and FMHA's motions to dismiss were held in abeyance, and a hearing was set for February 28, 1989, at which time debtor was expected to show cause why this case should not be dismissed with prejudice.

On the day before the date set for the show cause hearing, debtor filed a "Motion to Reconsider, Vacate, Alter, Amend and Modify Order on Motions to Dismiss and Motion to Reschedule Rule To

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[2]Debtor was given this extra chance to challenge the propriety of a prejudicial dismissal because the bankruptcy court, prior to its review of the record, had stated at the hearing on January 25, 1989, that it did not believe a dismissal with prejudice was appropriate. In the bankruptcy court's view it would have been "unfair," given its earlier indication that a prejudicial dismissal was not justified, to dismiss this case with prejudice "without allowing debtor an opportunity to show cause whey the same should not be granted." Bankruptcy Court Order of February 14, 1989, at 10.

Show Cause Hearing." Along with that motion, debtor submitted a proposed order for continuance of the show cause hearing. The bankruptcy court did not enter the proposed order, and debtor failed to appear at the show cause hearing even though his proposed order was not entered.

On March 8, 1989, the bankruptcy court entered the order underlying this appeal, which dismissed this case "with prejudice to the filing of any bankruptcy petition by debtor for a period of three years." Bankruptcy Court Order of March 8, 1989, at 3. The bankruptcy court relied on debtor's failure to abide by its orders as described in its order of February 14, 1989, and debtor's failure to appear at the show cause hearing. The

district court affirmed, and this appeal followed.

II.

Section 1112(b) provides a nonexhaustive list of grounds upon which a bankruptcy court may dismiss a Chapter 11 case for "cause." On appeal, debtor does not argue that dismissal of his case was not justified under section 112(b). Instead, the focus of debtor's argument is on whether the bankruptcy court's decision to prevent him from filing any bankruptcy case for three years goes beyond the mandates of 11 U.S.C., sec. 349(a) and 11 U.S.C., sec. 109(a).

Section 349(a) provides that:

"Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the

dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

11 U.S.C., sec. 349(a).[3] Section 109(g) provides in pertinent part as follows:

"Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--

"(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

"(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title."

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[3]As presently drafted, section 349(a) references section 109(f). However, this is the result of an oversight. Section 109(f) was redesignated section 109(g) by the Bankruptcy Judges, United States Trustees and Family Farmer Act of 1986, Pub. L. No. 99-554. A conforming amendment to section 349(a) was inadvertently not enacted.

11 U.S.C., sec. 109(g).

Debtor's position is that pursuant to section 11 U.S.C., sec. 349(a), bankruptcy dismissals are ordinarily without prejudice, and the bankruptcy court's power to deny him future access to bankruptcy court was constrained under section 349(a) by the 180-day limitation set forth in section 109(g).

We agree, in part, with debtor's argument. The task of interpreting section 349(a) "begins where all such inquiries must begin: with the language of this statute itself." United States v. Ron Pair Enterprises, Inc., 489, 241 (1989) (interpreting 11 U.S. C., sec. 506(b)). In this case, it is also where the inquiry ends, "for where, as here, the statute's language is plain, the sole

function of the courts is to enforce it according to its terms." Id. (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917).

By its terms, section 349(a) gives bankruptcy courts discretion to determine whether there is "cause to dismiss a case with prejudice. Under its precise language, however, section 349(a) only denies a debtor future discharge of debts dischargeable in that particular case. Section 349(a) does not deny a debtor all future access to bankruptcy court, except as provided in section 109(a).

The bankruptcy and district courts relied primarily on Lerch v. Federal Land Bank, 94 Bankr. 998 (N.D. Ill. 1989), as authority for looking beyond section 109(g) and prohibiting all access to

bankruptcy court for more than 180 days. In Lerch, the bankruptcy court ordered that the debtor was prohibited from filing a petition under Chapters 11,12, or 13 for a period of two years. The district court affirmed, holding that the phrase "[u]nless the court,, for cause, orders otherwise" at the beginning of section 349(a) modifies not only the discharge language preceding the semicolon in section 349(a), but also the filing provision which appears after the semicolon. Therefore, according to the district court, section 349(a) permitted the bankruptcy court, in its discretion, to prohibit the filing of any bankruptcy case beyond the limits of section 109(g).

Similar to Lerch, some bankruptcy

courts have also enjoined bankruptcy filings for some limited period beyond 180 days rather than deny a debtor a discharge of the debts dischargeable in that particular case. See In re Dilley, 125 Bankr. 189, 197 (Bankr. N.D. Ohio 1991) (one year); In re McKissie, 103 Bankr. 189, 193 (Bankr. N.D. Ill. 1989) (one year); In re Hundley, 103 Bankr. 768, 771 (Bankr. E.D. Va 1989) (one year). Like the Court in Lerch, these bankruptcy courts concluded that section 349(a) affords a bankruptcy court discretion to control future bankruptcy filings for over 180 days. Dilley, 125 Bankr. at 197-98 (citing Lerch); McKissie, 103 Bankr. at 193 (citing Lerch); Hundley, 103 Bankr. at 771.

In our view, Lerch and other courts

which have construed section 349(a) in the same fashion as Lerch have disregarded the binary structure of section 349(a) as reflected by both its punctuation and substantive content. The statute consists of two clauses, separated by a semicolon and addressing two distinct concerns: (1) the discharge in a later case of the particular debts dischargeable in the case dismissed and (2) the much different mater of the filing of any subsequent bankruptcy petition. Furthermore, each clause contains its own qualifying phrase; the discharge clause is modified by the "unless the court, for cause, orders otherwise" language, and the filing clause is modified differently by reference to section 109(g).

The Supreme Court has instructed that a statute must be read as "mandated by [its] grammatical structure." Ron Pair Enterprises, Inc., 489 U.S. at 241 (relying on location of commas in 11 U.S.C., sec. 506(b) to provide interpretation of statute). Accordingly, section 349(a), by its plain language, must be read as allowing a bankruptcy court, "for cause," to permanently disqualify a class of debts from discharge, but a bankruptcy court may not deny future access to bankruptcy court, except under the circumstances of section 109(g). Any other reading of section 349(a) is contrary to the language and punctuation used by Congress.[4]

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[4]The bankruptcy and district courts also cited 11 U.S.C., sec. 105(a) ("The court may issue any order, process, or

Moreover, we agree with debtor that the statutory construction in Lerch raises serious constitutional concerns. Depriving a debtor of access to the courts for 180 days is in itself a harsh remedy which may be questionable. See In Re Surace, 52 Bankr. 868, 871 (Bankr. C.D. Ca. 1985) ("The effect of 11 U.S.C., sec. 109(f) [now 109(g)] is to deprive

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judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].") as additional authority for denying debtor all access to bankruptcy court for three years. Such reliance was misplaced. The broad equitable powers that bankruptcy courts have under section 105(a) "may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code." In re Western Real Estate Fund, inc.,922 F. 2d 592, 601 (10th Cir. 1990). Consequently, the bankruptcy court's three-year prohibition against filing a bankruptcy case, which plainly contradicts the 180-day limitation under section 109(g), cannot be sustained under section 105(a).

the debtor to relief under the Bankruptcy Code for 180 days, an extraordinary statutory remedy for perceived abuses of the Code.") (emphasis added). Interpreting section 349(a) and section 109(g) to allow bankruptcy courts to prohibit future filings for a period greater than 180 days, not only contradicts the statute's plain meaning, but encroaches on the fifth amendment's due process and equal protection guarantees. Carried to its extreme, nothing would prevent bankruptcy court from baring a debtor from relief under the Code indefinitely.

When alternative interpretations of a statue exist, the fact that one interpretation presents serious constitutional difficulties, is in itself reason to reject such an approach. See Edward

J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 572 (1988). We do not minimize the problem of a debtor who abuses the court process and disobeys court orders. However, remedies other than prohibiting a party from using a statutory remedy in an unrelated matter are available to bankruptcy courts to meet the problem.

III.

To implement our interpretation of section 349(a) under the circumstances of this case, we must break down the preclusive effect of the bankruptcy court's dismissal order into three components: (1) denial of all access to bankruptcy court for 1280 days; (2) denial of such access for beyond 180 days; and (3) temporary denial of discharge of sched-

uled debts. In light of our limiting construction of section 349(a), the first two components may be dealt with briefly. The bankruptcy court's denial of all access to bankruptcy relief for 180 days is not reviewable in as much as 180 days have passed. See Travelers Ins. Co. v. Donlin Farms, 90 Bankr. 48 (W.D.N.Y. 1988). The bankruptcy court's denial of all access to bankruptcy court for more than 180 days was beyond the authority conferred under section 349(a) and, consequently, cannot stand. Therefore, the only aspect of this case left for our substantive review is the question whether there was sufficient "cause" within the meaning of section 349(a) to justify temporarily denying debtor a discharge of the debts scheduled in this

case for three years.

After the bankruptcy court's dismissal order was entered, this court, in **Hall v. Vance**, 887 F. 2d 1041 (10th Cir. 1989), indicated that a prejudicial dismissal under section 349(a) must be premised on bad faith conduct that is prejudicial to a creditor. Id. at 1045 (vacating a dismissal with prejudice because "[t]he [debtors]' tardiness . . . does not support a finding of bad faith [and] . . . neither party moving for dismissal made a showing [that debtors' conduct] . . . prejudiced them"). Although the bankruptcy court did not have benefit of our decision in Hall when this case was dismissed, the bankruptcy court nonetheless made determinations that amounted to findings of bad faith, see

Bankruptcy Court Order of March 8, 1989, at 3 ("debtor has established a clear record of delay and contumacious conduct") and prejudice, see Bankruptcy Court Order of February 14, 1989, at 6 ("To date, there appears to be virtually universal rejection of debtor's proposed plan. This, after more than three years during which debtor's creditors have been prevented from exercising their rights with regard to claims against the debtor and his property by reason of the automatic stay."). Such determinations by the bankruptcy court are factual findings, see In re N.R. Guaranteed Retirement, Inc., 119 Bankr. 149, 153 (N>D> Ill. 1990) (bankruptcy court's finding that conduct is prejudicial to a creditor "essentially involves a factual deter-

mination"); In Re Can-Alta Properties, Ltd., 87 Bankr. 89, 91 (Bankr. 9th Cir. 1988) ("[a] finding of bad faith is a factual determination"), which we review under the clearly erroneous standard, see Hall, 887 F. 2d at 1043.

After carefully reviewing the record, we conclude that several facts and circumstances support the bankruptcy court's conclusion that debtor acted in bad faith and in a manner that was prejudicial to his creditors. First, debtor waited nine months before filing an initial plan of reorganization. Such plan, as noted by the bankruptcy court, was not accompanied by a disclosure statement, and the failure to file a disclosure statement continued for more than a year after the bankruptcy court had ex-

plicitly ordered the filing of one. Cf. Id. (filing by debtor of objections to proofs of claim and plan of reorganization three days and one day late respectively, under deadlines set by the bankruptcy court was not sufficient evidence to support finding that debtor acted in bad faith). Furthermore, it is significant that subsequent plans of reorganization were submitted by debtor only after motions to dismiss were pending. Finally, on the eve of the hearing provided by the bankruptcy court to give debtor an additional opportunity to show cause why his bankruptcy case should not be dismissed with prejudice, debtor filed a motion seeking continuance of the hearing, but made no effort to confirm whether the motion was ever granted,and

then failed to appear. Debtor's overall conduct throughout the proceedings in bankruptcy court evidences a pattern of evasion, and prevented creditors from exercising their rights against debtor for over three years. In view of these facts, we cannot say that the bankruptcy court's findings of bad faith and prejudice were clearly erroneous.

IV.

Accordingly, we AFFIRM the order of the district court to the extent that it affirms the bankruptcy court's judgment dismissing the case, but only insofar as it temporarily denies debtor a discharge of the debts dischargeable in this case for a three-year period. The district court's order is REVERSED and REMANDED to the extent it affirms the judgment of the

bankruptcy court denying debtor all access to the bankruptcy court beyond 180 days for debts not related to this case.

MEMORANDUM OPINION OF
THE DISTRICT COURT,
filed December 29, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

In re: RANDY ARDEN FRIEOUF, Debtor.	)	(Chapter 11)
RANDY ARDEN FRIEOUF, Appellant.	)	
v.	)	CIV-89-1126-T
UNITED STATES OF AMERICA, FARM CREDIT BANK, Appellees.	)	BK-85-03466

MEMORANDUM OPINION

Before this Court is an appeal from the Order of Dismissal entered by the Honorable Paul B. Lindsey, United States Bankruptcy Judge for the Western District

of Oklahoma, in Case No. BK-85-03466-B (Chapter 11) on March 8, 1989. Randy Arden Frieouf, debtor appeals the court's dismissal of the captioned bankruptcy case with prejudice to any future filing of a bankruptcy petition for a period of three years, pursuant to 11 U.S.C., secs. 349(a) and 105(a). The issues for determination herein are (1) whether the bankruptcy court had any authority to dismiss the case with prejudice to any future filing of a bankruptcy petition for a period of three years, and (2) whether there was sufficient cause to justify the dismissal.

The Court finds that jurisdiction to consider the issues on appeal is present under the provisions of 28 U.S. C., secs. 1334 and 158. Pursuant to Bankruptcy

Rule 8013, findings of fact made by the court below shall not be set aside unless clearly erroneous; however, this Court reviews conclusions of law de novo. In re: New England Fish Co., 749 F. 2d 1277 (9th Cir. 1984).

In the above-referenced Order of Dismissal, the court below made a finding that "debtor has established a clear record of delay and contumacious conduct which justifies prohibiting the debtor from filing another bankruptcy petition for a period of time." (Order of Dismissal, pg. 3). The record upon which this finding is based reveals the following:

The debtor herein filed his voluntary petition in bankruptcy under Chapter 11 on September 30, 1985. On

March 8, 1989 -- the date the Order of Dismissal with prejudice was entered -- creditors were still without a consummated plan of reorganization upon which they could rely for satisfaction of the debtor's obligations to them. The debtor's actions and his counsel's actions in the three and one-half year interim are characterized by delay, inefficiency, dilatory tactics, failure to obey orders of court, and unprofessional and recalcitrant behavior. The specifics of this conduct are fully summarized in the February 14, 1989, Order on Motions to Dismiss and the March 8, Order of Dismissal, both of which were entered below, and which are incorporated herein by reference. This behavior culminated in debtor and debtor's counsel failing to

appear at a hearing set for February 28, 1989, at which debtor was directed to show cause why the bankruptcy case should not be dismissed with prejudice.

The court below relied on 11 U.S.C., sec. 349(a) in its dismissal of the bankruptcy case. Section 349(a) of the Code provides:

> (a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(f) [sic] of this title.

While the language of 349(a) refers to section 109(f), it is thought that the reference is intended to be to section 109(g). "[T]he statute's reference to Section 109(f) was apparently an over-

sight on the part of the drafters of the legislation -- as current Code 109(g) was formerly Code sec. 109(f) and Code 349(a) obviously meant to refer to current Code sec. 109(g) . . . " Lerch v. Federal Land Bank of St. Louis, 94 B.R. 998, 1000 (N.D. Ill. 1989).[1] The debtor on appeal does not dispute that 11

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[1]11 U.S.C. sec. 109(g) provides as follows:

> (g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title at any time in the preceding 180 days if--
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
>
> (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by sections 362 of this title.

U.S.C., sec. 349(a) intends to refer to section 109(g), as opposed to section 109(f). However, the debtor argues that based on the provisions of section 109(g), the court was limited to a 180-day prohibition with respect to refiling. 11 U.S.C., sec 105(a) provides as follows:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate or enforce or implement court orders or rules, or to prevent an abuse of process.

In In re Stuart Glass & Mirror, Inc., 71 B.R. 332 (Bkrtcy. S.D. Fla. 1987), the bankruptcy court ordered a dismissal with prejudice and ordered a refiling of any further bankruptcy petitions earlier than

two years after the dismissal. In so doing the court stated:

> It is both necessary and appropriate that this court prevent a dismissed debtor from refiling another petition and thereby obtaining the benefit of the statutory automatic stay (sec. 362) and imposing upon its creditors and the court he expense and delay of another reorganization proceeding when it has already been afforded one such opportunity.

Id. T 334. See also In re Lerch, 85 B.R. 491, 494 (Bkrtcy, N.D. Ill. 1988) ("There is strong sense that creditors should not be subjected to a repeat of the tortuous and expensive journey they have just been through."), aff'd, Lerch v. Federal Land Bank of St. Louis, 94 B.R. 998 (N.D. Ill. 1989); In re Damien, 35 B.R. 685, 687 (Bkrtcy. S.D. Fla. 1983) ("It would be obviously inequitable to permit the dismissed litigant to file another petition the following day ...).

In considering a case involving similar facts, the court in Lerch v. Federal Land Bank of St. Louis, supra, at 1001, addressed the issue as follows:

> When the court has found cause for dismissal with prejudice, the mandate of Section 109(g) is not applicable -- at least to the extent that it merely provides a minimum amount of time before a case may be refiled, not a maximum period of time for which the bankruptcy court may dismiss a case with prejudice when there is dismissal for cause.
>
> Therefore, based on the foregoing, this Court holds that Section 349(a) is not modified or limited by Section 109(g) so long as the bankruptcy court "for cause rules otherwise" and the bankruptcy court's dismissal of the case with prejudice for the two-year period falls under the "for cause" exception to Section 349(a).

It is therefore the opinion of this Court that 11 U.S.C., sec. 349(a) excepts from its provisions a dismissal with prejudice "for cause"; that 11 U.S.C., sec. 109(g) sets forth the minimum period (180

days) in which a debtor is prohibited from refiling after dismissal under its provisions; that 11 U.S.C., sec. 105(a) authorizes under its provisions an order of the bankruptcy court prohibiting it from refiling for a period in excess of 180 days; and that the bankruptcy court did not err in its finding of "cause" and did not abuse its discretion in the three-year prohibition against debtor's refiling. The Court finds the prohibition period reasonable and necessary to allow creditors sufficient time in which to pursue their state court remedies.

The judgment of the bankruptcy court is AFFIRMED.

IT IS SO ORDERED this 29th day of December, 1989.

United States District Judge

ORDER ON MOTIONS TO DISMISS,
filed February 14, 1989

IN THE UNITED STATES BANKRUPTCY
COURT FOR THE WESTERN DISTRICT
OF OKLAHOMA

IN RE:)
) BK-85-3466-B
RANDY ARDEN FRIEOUF,) Chapter 11
Debtor.

ORDER ON MOTIONS TO DISMISS

Debtor filed his voluntary petition under Chapter 11 on September 30, 1985. In its initial stages, litigation in the case consisted almost exclusively of extensive motion practice in which various creditors sought relief from the automatic stay of 11 U.S.C., sec. 362(a).

Almost nine months after the filing of the petition, debtor filed a plan of reorganization. No disclosure statement was filed at that time and thus no further proceedings with regard to the

plan of reorganization took place. On June 26, 1986, debtor filed monthly operating reports for the months of December 1985 through April 1986. On August 4, 1986, the court ordered debtors to file a disclosure statement by August 20, 1986. No disclosure statement was filed before, on or for more than one year after August 20, 1986. Automatic stay and abandonment litigation continued and on June 25, 1987, debtor filed monthly operating reports for the months of May 1986 through February 1987, and April 1987. On June 30, 1987, Federal Land Bank of Wichita filed its motion to dismiss pursuant to 11 U.S.C., sec. 1112(b).

On September 15, 1987, debtor filed his amended plan of reorganization and

disclosure statement. At an October 6 hearing on Federal Land Bank of Wichita's motion to dismiss, the motion was withdrawn without prejudice to its being refiled. An order was subsequently entered for a hearing on the disclosure statement under 11 U.S.C., sec. 1125. Federal Land Bank of Wichita timely filed its objection to the approval of the disclosure statement and at a hearing held December 8, 1987, debtor was given thirty days to amend his disclosure statement and Federal Land Bank of Wichita was given ten days after the filing of the amendment to review the amended disclosure statement. If no objections were filed, an agreed order was to be presented and the plan of reorganization was to be set for confirmation hearing.

Thereafter, Federal Land Bank of Wichita filed a motions to determine the value of real property, which motion was set for hearing in February 1988. At the date set for the hearing, it was announced that an agreement had been reached and that an agreed order would be submitted. The docket sheet in this case does not indicate that any such order was ever filed.

On September 30, 1986, Farm Credit Bank of Wichita, refiled its motion to dismiss. On November 17, 1988, debtor filed his amended disclosure statement and amended plan of reorganization. A hearing was set for December 13, 1988 to determine the adequacy of the disclosure statement. Farm Credit Bank of Wichita and Farmers Home Administration timely

filed objections to the disclosure statement. At the hearing, the motion to dismiss of Farm Credit Bank of Wichita was denied without prejudice, and the Farmers Home Administration objection to the disclosure statement was withdrawn. The disclosure statement was approved as modified at the hearing and it was ordered that the plan and disclosure statement be mailed no later than December 30, 1988, with a hearing on confirmation of the plan to be held January 25, 1989. Objections to confirmation of the plan were filed by Farmers Home Administration, Farm Credit Bank of Wichita and Grant County Bank and Farm Credit Bank of Wichita refiled its motion to dismiss the case.

At a hearing held January 25, 1989,

it was disclosed that neither the plan nor the disclosure statement was ever mailed to creditors. The motion to dismiss of Farm Credit Bank of Wichita was taken under advisement. Debtor was granted until February 3, 1989 to respond to that motion and to the oral motion of the Assistant United States Trustee to convert this case to a case under Chapter 7. Debtor was specifically requested to address in his response the issue of whether any dismissal should be with or without prejudice. Thereafter, Farmers Home Administration joined in the Farm Credit Bank of Wichita's motion to dismiss asserting a continuing loss or diminution of the estate, the absence of a reasonable likelihood of rehabilitation and the inability of debtor to effectuate

a plan of reorganization. Debtor timely filed his objection to the motion to dismiss and his response as directed by the court.

It is noted that at the December 13, 1988 hearing, counsel responded to the argument that no monthly operating reports had been filed since the filing of the April 1987 report in June 1987, by stating that he, counsel, had all of the subsequent reports in his office and that he had mistakenly believed that they constituted simply copies, rather than originals sent to him by debtor for filing. Improbable though such explanation may have been, the court accepted counsel's offer to transmit all of such reports for filing immediately upon his return to his office. At the January 25, 1989

hearing, it was noted that no reports had been filed, counsel assured the court that they had been transmitted from his office and that he had no idea why they had not been received. He assured the Court that copies would be transmitted for filing immediately. The reports were received and filed on February 10, 1989.

In response to the oral motion of the Assistant United States Trustee for conversion of the case to a case under Chapter 7, debtor asserts simply that he is a farmer as defined by 11 U.S.C., sec. 101(19) and that therefore, under 11 U.S.C., sec. 1112(c), the court may not convert the case unless he debtor requess such conversion. Debtor neither provides any evidence whatever or offers to direct the court to any evidence which would

support his conclusory averment that he comes within the statutory definition of "farmer" in 11 U.S.C., sec 101(19). Counsel simply makes the statement then asserts, regally, that "the point cannot be seriously disputed further."

Following the January 25, 1989 hearing, the court was informally advised that the creditors which had objected to the confirmation of debtor's plan intended to formulate and file a liquidating plan of reorganization. Clearly, such would be permissible, since the period during which only the debtor may file a plan of reorganization under 11 U.S.C., sec. 1121(b), expired over three years ago. No such plan has been filed, however, and neither Farm Credit Bank of Wichita nor Farmers Home Administration

has sought to withdraw its motion to dismiss. It would be inappropriate for the court to further delay this already duly protracted proceeding based upon communications not part of the record, particularly when the official record would appear to contradict those communications. The court will therefore consider the motions to dismiss and the oral motion to convert.

Even though counsel's assertion that debtor is a "farmer" as that term is defined in the Bankruptcy Code, is wholly unsupported in the record, the court is prepared to accept the same for purposes of the oral motion only. To do otherwise would simply provide debtor and his counsel with yet another opportunity to delay these proceedings through the

exercise of appellate procedures. Thus, the oral motion to convert will be denied.

As the history of this case, recited above will clearly indicate, there has been little or no apparent effort on the part of debtor or his counsel to formulate a confirmable plan of reorganization. It appears that the only plans which have been filed have been filed solely to create an argument in opposition to various motions seeking to terminate the proceeding. The first plan was not even accompanied by a disclosure statement, and an approved disclosure statement is a necessary prerequisite to the solicitation of acceptances. 11 U.S.C., sec. 1125(b). The failure to file a disclosure statement continued,

even after the court order the filing of the same.

The first amended plan of reorganization was accompanied by a disclosure statement, but after a hearing, when the court directed that the same be amended within thirty days, no further action was taken. The most recent disclosure statement and plan of reorganization were filed 38 months after the initiation of these proceedings, and even after counsel for debtor was directed to transmit to creditors the plan and disclosure statement, as modified, no such transmittal was effected. Counsel now asserts that the court must convene a valuation hearing on certain of the debtor's assets and, presumably, must thereafter once gain convene a hearing to determine

whether the disclosure statement should be approved and, if approved, order a hearing on the confirmation of the plan. To date, there appears to be virtually universal rejection of debtor's proposed plan. This, after more than three years during which debtor's creditors have been prevented from exercising their rights with regard to claims against the debtor and his property by reason of the automatic stay.

In his objection to the motions to dismiss and request for conversion, debtor cites the court's denial of Farm Credit Bank of Wichita's motion to dismiss at the December 13, 1988 hearing as constituting res judicata as to anything occurring prior to that date. As counsel well knows, the denial of the

motion to dismiss was solely for the purpose of permitting the debtor yet another opportunity to demonstrate that he could formulate and obtain acceptance of a plan of reorganization. It did not constitute an adjudication of the merits of the motion to dismiss at that time, and the court made this fact clear when announcing its ruling.

Counsel for debtor also makes it quite clear in his objection that he believes debtor qualifies for relief under Chapter 12 and that, while conceding that he cannot convert from a Chapter 11 to Chapter 12, nothing will prohibit him from filing a Chapter 12 petition upon the dismissal of this case. It is this threat, or promise, however one wishes to view it, which has caused

the creditors to seek extraordinary relief of dismissal with prejudice.

Section 349(a) of the Bankruptcy Code, (Title I of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2545, as amended), is as follows:

Sec. Effect of dismissal.

> (a) unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(f) of his title.

The section 109(f) referred to in Sec. 349(a) was added by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, and was redesignated as subsection (g) by the Bankruptcy Judges, United States Trustees and Family

Farmer Bankruptcy Ac of 1986, Pub. L. 99-554, when a new subsection (f) was added by the Chapter 12 provisions of that Act. That provision, to the extent material to the court's present inquiry, is as follows:

> (g) notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or appear before the court in a proper prosecution of the case
> . . . .

As was pointed out in In re McClure, 69 B.R. 282 (Bankr. N.D. Ind. 1987):

> The Debtor is a fiduciary of this Court and has a fiduciary obligation to its creditors the same as a trustee. Commodity Future Trading Commission v. Weintraub, 471 U.S. 343 . . . (1985). The disclosure of financial condition by periodic reporting to interested parties is high on the list of fiduciary

obligations of the debtor-in-possession and is to be excused only for justifiable cause.

In re Modern Office Supply, Inc., 28 B. R. 943, 945 (Bank. W.D. Okla. 1983)

. . .

> The Court nor the creditors should have to neither coerce or implore the debtor as a fiduciary into filing timely, accurate and complete monthly operating statements while at the same time the Debtor is asking for the pervasive protection afforded by the Bankruptcy Code.

As was noted by the court in the recitation of the history of this action, the petition was filed in September 1985. Nine months later, monthly operating reports were filed for the third through seventh months following the petition date. Almost one year later, monthly operating reports were filed for 11 of the next 12 months. In July 1987, two additional monthly operating reports were filed. Between July 1987 and February 10, 1989, no further monthly operating re-

ports were filed. Of course, such reports are required to be filed monthly, and the court specifically ordered debtor and his counsel on at least two occasions to forthwith file the same. As is also noted above, the court was assured on those two occasions that the reports had been prepared and could be filed immediately.

The numerous failures to comply with orders of the court, with regard to monthly operating reports, the filing of a disclosure statement, and the transmittal of the disclosure statement and plan, among others, have been cleverly characterized by counsel as being simply the result of misunderstandings on the part of counsel. Misunderstandings which, in several instances, would only

be possible if counsel were unable to communicate in the English language. The court is unfortunately reminded of the hopefully fictional movie or television attorney who avoids or delays certain defeat by engaging in such outrageous behavior as to require a mistrial.

The court has reviewed a number of cases in which dismissal with prejudice is discussed. See Martin-Trigona, 35 B.R. 596 (Bankr. S.D. N.Y. 1983); In re Petro, 18 B.R. 566 (Bankr. E. D. Pa. 1982); In re McClure, supra; In re Mandalay Shores Co-Op Housing Association, Inc., 63 B.R. 842 (Bankr. N.D. Ill., 1986); Matter of Ladd, 82 B.R. 476 (Bankr. N.D. Ind. 1988). Although it is clear that dismissal with prejudice is a drastic sanction which may affect sub-

stantial rights of the litigant and should only be used in extreme situations, In re Martin-Trigona, supra, 35 B.R. at 601, it is equally clear that such sanction may be appropriate where there is a clear record of delay and contumacious conduct. Id. Discussing the finding of unreasonable delays as a result of debtor's conduct, the court in In re McClure, supra, found the following quotation from In re Bystrek, 17 B.R. 894 (Bankr. E.D. Pa. 1982) to be instructive:

> The troubling aspect of this case is that debtor's counsel seems to believe that Bankruptcy Court is a legal playground where the debtor can indulge in an elaborate of catch-me-if-you-can with her creditors. Such is not the case. Although the law grants a generous measure of relief to debtors, this benefit is not gratuitous. The law also imposes a measure of responsibility. As a member of the bar and an officer of the Court, counsel should

be especially aware of this fact. The game attempted in this case cannot be permitted.

Having reviewed the almost unbelievably lengthy record of proceedings in this case, the court has become convinced that the criteria established by the cases cited herein as being supportive of the admittedly harsh sanction of dismissal with prejudice, are met. The court is of the view that dismissal with prejudice offers the only feasible means by which the creditors of this debtor can expect to have any opportunity to enforce their rights against the debtor or his property.

The court is also mindful of having made the statement at the most recent hearing in this matter, that it did not

believe that a dismissal with prejudice was warranted in this case. That statement was made prior to the court's thorough review of the lengthy record in this case, of the cases cited by counsel in support of their motions to dismiss, and of debtor's response. Having made that statement, albeit prematurely, it is this court's view that it would be unfair for the court to grant the motions for dismissal with prejudice without allowing debtor an opportunity to show cause why the same should not be granted.

The court will therefore hold in abeyance the motions to dismiss filed by Farm Credit Bank of Wichita and Farmers Home Administration and will set a hearing for the 28th day of February, 1989 at 9:30 a.m., at which debtor will

be directed to show cause, if cause there be, why this bankruptcy case should not be dismissed with prejudice under the provisions of sections 349(a) and 109(g)(1) of the Bankruptcy Code.

IT IS SO ORDERED this 14th day of February, 1989.

/s/ Paul B. Lindsey
Paul B. Lindsey
U.S. BANKRUPTCY JUDGE

ORDER OF DISMISSAL,
filed March 8, 1989

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	BK-85-03466-B
RANDY ARDEN FREIOUF,	)	Chapter 11
	)	
Debtor,	)	

ORDER OF DISMISSAL

On Feberuary 14, 1989, this court entered an order stating that the motions to dismiss filed by Farm Credit Bank of

Wichita and by Farmers Home Administration would be held in abeyance pending a hearing to show cause why the bankruptcy case should not be dismissed with prejudice. That hearing was set for February 28, 1989.

On February 27, 1989, counsel for debtor filed a "Motion to Reconsider, Vacate, Alter, Amend and Modify Order of Motions to Dismiss and Motion to Reschedule Rule to Show Cause Hearing". Also on February 17, 1989, debtor's counsel submitted a proposed order for continuance of the show cause hearing. The proposed order was not signed by debtor's counsel approving it for entry as required by Local Bankruptcy Rule 12(f). There was no other communication from debtor's counsel to the court.

Debtor's counsel failed to appear at the show cause hearing on February 28, 1989, even though the proposed order continuing the hearing had not been entered by the court.

At the show cause hearing, the court dismissed the bankruptcy case with prejudice pursuant to 11 U.S.C., sec. 349(a). Counsel for various creditors requested at the hearing that this court dismiss the case with prejudice to any future filing of a bankruptcy petition for a period of three years. Creditors seek this extraordinary relief because debtor has expressed his intention to file a Chapter 12 petition upon the dismissal of this case. The creditors requested that the prohibition be for three years in order for them to have

sufficient time to pursue their state court remedies.

Section 109(g)(1) of title 11 provides that:

> (g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if --
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case;

This bankruptcy case was dismissed both for debtor's failure to abide by orders of the court, as more fully described in this court's Order of February 14, 1989, and for debtor's failure to appear at the show cause hearing.

Section 349)a) of title 11 states that unless the court orders otherwise, the dismissal does not prejudice the

debtor on refiling except as provided in section 109(g) of this title. Section 349(a) and 109(g, read together, allow the court to look beyond sec. 109(g) and prohibit a debtor from filing a case for more than 180 days. In re Lerch, 85 b.r. 491, 494 (Bankr. N.D. Ill. 1988), aff'd Lerch v. Federal Land Bank, 1989 U.S. Dist. LEXIS 263 (N.D. Ill. 1989) (Chapter 12 case was dismissed with prohibition on filing a petition under any chapter except Chapter 7 for two years).

Further more, the court has the power under 11 U.S.C., sec. 105 to prohibit debtor from filing further bankruptcy petitions.

> Section 105(a) grants this court discretion to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." It is both necessary and appropriate that this

> court prevent a dismissed debtor from immediately refiling another petition and thereby obtaining the benefit of the statutory automatic stay (sec. 362) and imposing upon its creditors and the court the expense and delay of another reorganization proceeding when it has already been afforded one such opportunity . . . . There is no provision in the Bankruptcy Code or Bankruptcy Rules which prohibits such an exercise of this court's discretion.

In re Stuart Glass & Mirror, Inc., 71 B.R. 332, 334 (Bankr. S.D. Fla. 1987) (Chapter 11 case was dismissed with prohibition on filing any bankruptcy petition for two years).

As detailed in this court's Order of February 14, 1989, debtor has established a clear record of delay and contumacious conduct which justifies prohibiting the debtor from filing another bankruptcy petition for a period of time. See In re Wehrenberg, BK-87-01991-A (Bankr. W.D. Okla. Aug. 1, 1988) (order stipulating to

dismissal of Chapter 11 case with prejudice to filing subsequent bankruptcy petitions for the greater of 8 months or the completion of certain state court remedies); In re French, BK-86-07318-A (Bankr. W.D. Okla. July 20, 1987) (order dismissing Chapter 12 case with prejudice to filing of subsequent bankruptcy case for years). The three year period requested by the creditors appears reasonable in view of the work load of the state courts.

Accordingly, the motions to dismiss filed by Farm Credit Bank of Wichita and Farmers Home Administration, which were held in abeyance pursuant to this court's Order of February 14, 1989, are hereby granted. This bankruptcy case is dismissed with prejudice to the filing of

any bankruptcy petition by debtor for a period of three years from the date of this order. Debtor's motion to reconsider the Order of February 14, 1989, is denied.

IT IS SO ORDERED this 8th day of March, 1989.

/s/Paul b. Lindsey
Paul B. Lindsey

NO. 91-733
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

RANDY ARDEN FRIEOUF,

Petitioner

versus

UNITED STATES OF AMERICA, and FARM CREDIT BANK,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT FARM CREDIT BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

INTRODUCTION

The Farm Credit Bank of Wichita, formerly known as the Federal Land Bank ("FCB"), one of the respondents herein, respectfully requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit (the "Petition") filed by the debtor and petitioner, Randy Arden Frieouf ("Petitioner"). The Petitioner seeks

review of the Opinion of the United States Court of Appeals for the Tenth Circuit (the "Court of Appeals") entered in the proceedings below on July 10, 1991.

II.

LISTING PURSUANT TO SUP. CT. R. 29.1

FCB is a Federally chartered instrumentality of the United States. FCB was established pursuant to 12 U.S.C. § 2011(a) through the merger of The Federal Land Bank of Wichita and The Federal Intermediate Credit Bank of Wichita. FCB is a part of the Farm Credit System and provides loans to borrowers in the Ninth Farm Credit District, which includes Oklahoma, Kansas, Colorado and New Mexico.

FCB has no parent company or non-wholly owned subsidiaries.

III.

CONSIDERATIONS FOR REVIEW ON WRIT OF CERTIORARI ARE NOT PRESENT

The usual criteria for granting a writ of certiorari are not present. The decision of the Court of Appeals does not conflict with the decision of another United States court of appeals on the same matter. Furthermore, the Court of Appeals has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

No issue before the Court of Appeals in this case is such an important question of federal law that it should be settled by this Court. Furthermore, the Opinion of the Court of Appeals has not decided a federal question in a way that conflicts with the applicable decisions of this Court.

IV.

QUESTIONS PRESENTED

In his Petition, Petitioner lists six "Questions Presented". However, in his "Reasons for Granting the Writ", Petitioner argues as to only two issues which may succinctly be restated as follows:

A. Where "cause" exists, may a bankruptcy court temporarily deny a discharge of certain debts under 11 U.S.C. § 349(a)?

B. Was there "cause" in this case for temporary denial of discharge of certain debts?[1]

V.

CHRONOLOGY OF RELEVANT EVENTS

In his statement of the case, Petitioner has failed to accurately include all of the relevant events which caused Petitioner's

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[1] The first issue encompasses Petitioner's "issues" No. 1, 2, 3, 4 and 5. The second issue covers Petitioner's "issue" No. 6.

bankruptcy case to be dismissed with prejudice. The relevant events of this case are as follows:

A. **September 20, 1985** - Petitioner filed a voluntary chapter 11 bankruptcy petition, commencing his bankruptcy case, in the United States Bankruptcy Court for the Western District of Oklahoma (the "Bankruptcy Court"; the "Bankruptcy Case"). Petitioner did not file a plan of reorganization until **June 10, 1986**, almost nine months later. No disclosure statement was filed at that time. See Order on Motions to Dismiss.[2]

B. **June 26, 1986** - Petitioner filed monthly operating reports for the months of December, 1985 through April, 1986. Petitioner did not file any other monthly operating reports until **June 25, 1987**, one year later, at which time monthly operating reports were filed for

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[2] The Order on Motions to Dismiss, entered by the Bankruptcy Court on February 14, 1989, is attached to the Petition as part of the Appendix, commencing on page 40 of the Appendix.

the months of May, 1986 through April, 1987. See Order on Motions to Dismiss.

C. **August 4, 1986** - Bankruptcy Court ordered Petitioner to file a disclosure statement by **August 20, 1986**. Petitioner ignored the Bankruptcy Court's order. A disclosure statement was not filed until **September 15, 1987**, over a year later. See Order on Motions to Dismiss.

D. **June 30, 1987** - FCB filed its first motion to dismiss the Bankruptcy Case. See Order on Motions to Dismiss.

E. **September 15, 1987** - Petitioner filed an amended plan of reorganization and disclosure statement.[3] See Order on Motions to Dismiss.

F. **November 13, 1987** - Bankruptcy Court entered its order scheduling a hearing on **December 8, 1987**, for approval of the disclosure statement. FCB filed its objection to the

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[3] Because Petitioner filed the amended plan of reorganization and disclosure statement, FCB withdrew, without prejudice, its motion to dismiss.

disclosure statement. See Order on Motions to Dismiss.

G. **December 8, 1987** - Hearing on disclosure statement conducted. Petitioner was given 30 days to amend the disclosure statement. An agreed order was to be presented and the plan of reorganization was to be set for a confirmation hearing.[4] No agreed order was ever entered. See Order on Motions to Dismiss.

H. **September 30, 1988** - FCB refiled its motion to dismiss. See Order on Motions to Dismiss.

I. **November 17, 1988** - Petitioner filed a second amended plan of reorganization and disclosure statement. See Order on Motions to Dismiss.

J. **December 13, 1988** - Hearing scheduled to approve disclosure statement. FCB and Farmers Home Administration ("FmHA"), the

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[4] In spite of repeated demands, Petitioner failed to provide FCB with the additional information required to effect an agreed amendment to the disclosure statement. As a result, an agreed order approving the disclosure statement was never entered.

other respondent herein, timely filed objections to the disclosure statement. FCB's motion to dismiss was denied without prejudice. The disclosure statement was approved as modified.[5] See Order on Motions to Dismiss.

K. **December 13, 1988** - Petitioner had not filed any monthly operating reports since **June, 1987**. Counsel for Petitioner advised the Bankruptcy Court that the delinquent monthly operating reports would be filed immediately.[6] See Order on Motions to Dismiss.

L. **December 13, 1988** - Bankruptcy Court ordered that Petitioner's amended plan of reorganization and disclosure statement be mailed to creditors no later than **December 30, 1988**. Bankruptcy Court further ordered that a

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[5] FCB objected to the disclosure statement, inter alia, on the grounds that it did not provide adequate information. Counsel for Petitioner agreed to provide this information. Accordingly, FCB agreed that it would withdraw its objection to the disclosure statement upon receiving this information.

[6] The delinquent monthly operating reports were not filed until February 10, 1989, approximately sixty (60) days later.

hearing on confirmation of the plan of reorganization would be held on January 25, 1989. See Order on Motions to Dismiss.

M. January 19-24, 1989 - Objections to the amended plan of reorganization were filed by FCB, FmHA and Grant County Bank. FCB refiled its motion to dismiss the Bankruptcy Case with prejudice. See Order on Motions to Dismiss.

N. January 25, 1989 - At scheduled hearing, plan confirmation could not be considered because Petitioner had not mailed the amended plan of reorganization and the disclosure statement to creditors. FCB's motion to dismiss was taken under advisement by the Bankruptcy Court. FmHA subsequently joined in FCB's motion to dismiss with prejudice. See Order on Motions to Dismiss.

O. January 25, 1989 - Bankruptcy Court noted that Petitioner's monthly operating reports, which the Bankruptcy Court had been assured would be filed at the December 13, 1988 hearing, had still not been filed. These

reports were subsequently filed, but not until **February 10, 1989**. See Order on Motions to Dismiss.

- Bankruptcy Court further noted that in order to confirm a plan of reorganization, it would still be necessary for the Bankruptcy Court to convene a valuation hearing on certain of Petitioner's assets, and once again, convene a hearing to determine whether the disclosure statement should be approved. Furthermore, if the disclosure statement was approved, the Bankruptcy Court would be required to conduct a hearing on the confirmation of the amended plan of reorganization. See Order on Motions to Dismiss.[7]

- Bankruptcy Court further noted that after more than three years, during which time

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[7] The significance of these observations by the Bankruptcy Court is that Petitioner had been in a chapter 11 case for more than 3 years without even pursuing some of the most basic prerequisites to the plan confirmation process -- determinations of amounts of claims and collateral values. Of course, during that 3-year plus period, Petitioner enjoyed the benefits of chapter 11, including the protection from his creditors afforded by the automatic stay of 11 U.S.C. § 362(a).

creditors were prevented from exercising their rights against their collateral by reason of the automatic stay, there still appeared to be virtually universal rejection of Petitioner's proposed plan of reorganization. See Order on Motions to Dismiss.

P. **February 18, 1989** - Bankruptcy Court entered its Order on Motions to Dismiss and directed that an additional hearing would be conducted on **February 28, 1989**, at which time Petitioner could appear and show cause why the Bankruptcy Case should not be dismissed with prejudice. See Order on Motions to Dismiss.

Q. **February 28, 1989** - Petitioner and counsel for Petitioner failed to appear at the show cause hearing. Petitioner and his counsel failed even to notify the Bankruptcy Court or opposing counsel that they would not appear. See Order of Dismissal.[8]

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[8] The Order of Dismissal, entered by the Bankruptcy Court on March 8, 1989, is attached to the Petition as part of the Appendix, commencing on page 62 of the Appendix.

R. **March 8, 1989** - Bankruptcy Court entered Order of Dismissal, dismissing Bankruptcy Case with prejudice to the filing of any bankruptcy petition by Petitioner for a period of three (3) years. See Order of Dismissal.

S. **December 29, 1989** - United States District Court for the Western District of Oklahoma, in Case No. CIV-89-1126-T, entered a Memorandum Opinion affirming the decision of the Bankruptcy Court. See Memorandum Opinion.[9]

T. **July 10, 1991** - Court of Appeals entered its Opinion. See Opinion.[10]

VI.

PETITIONER'S MISSTATEMENTS OF FACT

Sup. Ct. R. 15.1 provides that the brief in opposition to a petition for writ of

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[9] A copy of the Memorandum Opinion is attached to the Petition as part of the Appendix, commencing on page 30 of the Appendix.

[10] A copy of the Opinion is attached to the Petition as part of the Appendix, commencing on page 2 of the Appendix.

certiorari "should address any perceived misstatements of fact or law set forth in the petition . . . ." The Petition is replete with misstatements which cannot go unmentioned.

Rather than address each misstatement in the body of this brief, for the sake of brevity, Schedule 1 is attached hereto for such purpose.

VII.

PETITIONER'S MISSTATEMENTS OF LAW -- ARGUMENTS AND AUTHORITIES

As noted above, Sup. Ct. R. 15.1 directs the a brief in opposition to a petition for writ of certiorari address perceived misstatements of law. The following discussion concerns misstatements of law contained in the Petition.

The discussion is organized as it pertains to the questions presented (see part IV, infra.)

A. WHERE CAUSE EXISTS, A BANKRUPTCY COURT MAY TEMPORARILY DENY A DISCHARGE OF CERTAIN DEBTS UNDER 11 U.S.C. § 349(a).

1. The Court of Appeals Properly Construed 11 U.S.C. §349(a).

11 U.S.C. § 349(a) provides as follows:

> "Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109[g] of this title.[11]

11 U.S.C. § 109(g) provides in pertinent part as follows:

> "Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any

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[11] As presently drafted, 11 U.S.C. § 349(a) references 11 U.S.C. § 109(f). However, this is the result of an oversight. 11 U.S.C. § 109(f) was redesignated 109(g) by the Bankruptcy Judges, United States Trustees and Family Farmer Act of 1986, Pub. L. No. 99-554. A conforming amendment to 11 U.S.C. § 349(a) was inadvertently not enacted.

> time in the preceding 180 days if --
>
> "(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
>
> "(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title."

The Court of Appeals termed the provision before the semi-colon in 11 U.S.C. § 349 as the "discharge" clause and the language after the semi-colon as the "filing" clause. The Court of Appeals found that it was the "discharge" clause which was applicable in this case; not the "filing" clause.[12]

Under the discharge clause, the dismissal of a case does not bar the discharge of debts in a later case unless the court, for

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[12] The filing clause prohibits the filing of any bankruptcy petition for 180 days if the requirements of 11 U.S.C. § 109(g) are met.

cause, orders otherwise. In this case, there was sufficient "cause".

2. Petitioner Erroneously Relies Upon 11 U.S.C. §§ 523, 727 and 1141

As discussed more fully below, Petitioner contends that findings of "cause" for dismissal with prejudice can be made only under the provisions of 11 U.S.C. §§ 523, 727 and 1141. Petitioner argues, without citation of authorities, that outside of these three bankruptcy code sections (i.e., 11 U.S.C. §§ 523, 727, and 1141), there can be no "cause" which will support a temporary denial of the dischargeability of certain debts. Petitioner is wrong.

a. 11 U.S.C. § 523[13] is not applicable.

11 U.S.C. § 523(a) provides that certain debts of an individual debtor are excepted from a discharge under 11 U.S.C. §§ 727, 1141, 1228(a), 1228(b) or 1328(b).

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[13] 11 U.S.C. § 523(a) and (c) are set forth in the Appendix attached hereto.

None of these sections has any application to this case.[14]

A determination that a debt is not discharged under 11 U.S.C. § 523 is a determination that the specific debt is permanently precluded from discharge. 11 U.S.C. § 523(a) lists twelve types of debts which are not dischargeable. None of these twelve specific exceptions apply in the Bankruptcy Case.

11 U.S.C. § 523 simply has no application to this case.[15] 11 U.S.C. § 523

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[14] 11 U.S.C. § 727 is the provision of title 11 of the United States Code which provides for a discharge for debtors in chapter 7 (liquidation) cases -- Petitioner was a debtor in the Bankruptcy Case which he filed under chapter 11 (Reorganization). 11 U.S.C. §§ 1141, 1228(a-b) and 1328(b) provide for discharge for debtors who obtain confirmed plans in cases under chapter 11 (Reorganization), chapter 12 (Adjustment of Debts of a Family Farmer with Regular Annual Income) and chapter 13 (Adjustment of Debts of an Individual with Regular Income) -- 11 U.S.C. §§ 1228(a-b) and 1328(b) have no application as Petitioner was a chapter 11 debtor; 11 U.S.C. § 1141 only applies when a plan is confirmed.

[15] Moreover, Petitioner incorrectly states that actions under 11 U.S.C. § 523 are always adversary proceedings that are always governed by Bankruptcy Rule 4007 and Part VII of the Bankruptcy Rules. 11 U.S.C. § 523(c) [which is included in the Appendix] requires a complaint to determine the dischargeability of only those

does not address, and is not intended to address, the temporary denial of dischargeability of certain debts for "cause" under 11 U.S.C. § 349(a).

b. 11 U.S.C. § 727[16] is not applicable.

Petitioner also argues that 11 U.S.C. § 727 applies. 11 U.S.C. § 727 provides that the bankruptcy court shall grant a chapter 7[17] debtor a discharge unless certain grounds for denial exist. If any of the grounds are present, the debtor is denied a discharge of all of his debts.[18]

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debts listed under 11 U.S.C. § 523(a)(2), (4) and (6). 11 U.S.C. § 523 provides for the automatic exception from discharge of the other nine types of debts.

[16] 11 U.S.C. § 727 is included in the Appendix.

[17] As noted above, 11 U.S.C. § 727 has no application to this case because this is a case under chapter 11, not chapter 7, of title 11 of the United States Code. See footnote 14, supra.

[18] 11 U.S.C. § 727 is to be distinguished from 11 U.S.C. § 523. 11 U.S.C. § 523 addresses the dischargeability of specific debts. 11 U.S.C. § 727 addresses the issue of whether the debtor should be discharged in bankruptcy of all of his debts, or denied a discharge in bankruptcy of all of his debts.

11 U.S.C. § 727 simply does not apply to this case, as it does not address the temporary denial of dischargeability of certain debts for "cause" under 11 U.S.C. § 349(a).

c. 11 U.S.C. § 1141[19] is not applicable.

Petitioner also argues that 11 U.S.C. § 1141 applies to this case. Again, Petitioner is wrong. 11 U.S.C. § 1141, which deals with post-confirmation matters, is not applicable simply because a plan was never confirmed in this case.

11 U.S.C. § 1141 provides that the confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under 11 U.S.C. § 523 or 727.

3. The Term "For Cause" in 11 U.S.C. § 349(a) Does Not Require Prior Adjudications.

Petitioner next argues that the term "for cause" in 11 U.S.C. § 349 requires prior adjudications of nondischargeability of debts

[19] 11 U.S.C. § 1141 is included in the Appendix.

under 11 U.S.C. § 523 or denials of discharge under 11 U.S.C. § 1141 (incorporating 11 U.S.C. § 727).

Petitioner is again wrong. 11 U.S.C. § 349(a) makes no reference to 11 U.S.C. §§ 523, 727 or 1141 with regard to what may constitute "cause".

The legislative history of 11 U.S.C. § 349(a) indicates that 11 U.S.C. § 349(a) was intended by Congress to provide for pre-discharge dismissals. The legislative history makes only one reference as to 11 U.S.C. § 727, which is as follows:

> "If the debtor has already received a discharge and it is not revoked, then the debtor would be barred under Section § 727(a) from receiving a discharge in a subsequent liquidation case for six years."

S. Rep. No. 989, 95th Cong., 2d Sess. (1978). 11 U.S.C. § 349(a) applies pre-discharge, i.e., before any determinations of dischargeability or denials of discharge would even need be considered.

Therefore, Petitioner's argument that some prior determination of dischargeability or denial of discharge is required is misplaced.

4. The Court of Appeals Did Not Exercise Original Jurisdiction to Impose New Restrictions on Petitioner.

Petitioner contends, in a somewhat confusing manner, that the Court of Appeals exercised original jurisdiction to impose new restrictions on Petitioner. Petitioner is mistaken.

The Bankruptcy Court went through a detailed summary of the Bankruptcy Case as reflected in its Order on Motions to Dismiss and its Order of Dismissal, and found that "cause" existed for the dismissal of the Bankruptcy Case with prejudice to the filing of a subsequent bankruptcy petition for three (3) years. See V.B. below. The Court of Appeals made no new findings, and simply noted that the findings of the Bankruptcy Court were determinations which amounted to acts of bad

faith and prejudice by Petitioner. See V.B. below.

The Court of Appeals modified the Bankruptcy Court's ruling (to the benefit of Petitioner) by holding that the Bankruptcy Court could not enjoin the filing of any bankruptcy petition by Petitioner for a three-year period. However, the Court of Appeals upheld that portion of the Bankruptcy Court's decision which prohibited the discharge of those debts existing in the Bankruptcy Case for a period of three (3) years.

Petitioner, therefore, simply is mistaken in his argument that the Court of Appeals exercise original jurisdiction.

B. "CAUSE" EXISTED FOR TEMPORARY DENIAL OF DISCHARGE OF CERTAIN DEBTS.

The Bankruptcy Court, as reflected in the Order on Motions to Dismiss, summarized the procedural history of the Bankruptcy Case and found the following:

- that there was little or no apparent effort on the part of

Petitioner's counsel to formulate a confirmable plan of reorganization;

- that the only plans filed had been filed solely to create an argument in opposition to various motions seeking to terminate the proceeding;
- that the first plan was not even accompanied by a disclosure statement and that an approved disclosure statement is a necessary prerequisite to the solicitation of acceptances;
- that the failure to file a disclosure statement continued even after the court had ordered the filing of the disclosure statement;
- that the first amended plan of reorganization was accompanied by a disclosure statement, but

after a hearing, when the Bankruptcy Court directed that the same be amended within thirty days, no further action was taken;

- that the most recent disclosure statement and plan of reorganization were filed 38 months after the initiation of these proceedings;
- that even after Petitioner's counsel was directed to transmit to creditors the plan and disclosure statement, as modified, no such transmittal was effected;
- that there were numerous failures by Petitioner to comply with orders of the Bankruptcy Court;
- that these failures were cleverly characterized by

Petitioner's counsel as being simply the result of misunderstandings on the part of counsel;[20] and

- that after having reviewed the "almost unbelievably lengthy record of proceedings in this case," the Bankruptcy Court was convinced that the criteria established for dismissal with prejudice were met.[21]

The Bankruptcy Court did not dismiss the Bankruptcy Case with prejudice until after the Bankruptcy Court advised Petitioner and his counsel of the Bankruptcy Court's findings discussed above and gave Petitioner and his counsel the opportunity to attend the "show cause" hearing. The Bankruptcy Court, as

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[20] "Misunderstandings which, in several instances, would only be possible if counsel were unable to communicate in the English language." See Order on Motions to Dismiss.

[21] See discussion at V above regarding additional findings which support dismissal with prejudice.

reflected in the Order of Dismissal, held that Petitioner had established "a clear record of delay and contumacious conduct which justifies prohibiting [Petitioner] from filing another bankruptcy petition for a period of time."

The Bankruptcy Court found "cause" for dismissing the Bankruptcy Case with prejudice. Neither the District Court nor the Court of Appeals made, or was required to make, additional findings of "cause" for the dismissal with prejudice. The Court of Appeals did conclude, however, that the Bankruptcy Court's specific findings of "cause" amounted to findings of bad faith and prejudice. See Court of Appeals' Opinion.

The Court of Appeals held as follows:

> "After carefully reviewing the record, we conclude that several facts and circumstances support the [B]ankruptcy [C]ourt's conclusion that [Petitioner] acted in bad faith and in a manner that was prejudicial to his creditors . . . . In view of these facts, we cannot say that the [B]ankruptcy [C]ourt's findings of bad faith and

prejudice were clearly erroneous."

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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THE FARM CREDIT BANK OF WICHITA

14\Frieouf.OBJ (618-698)

SCHEDULE 1

PETITIONER'S MISSTATEMENTS OF FACT

Petitioner's Statement	Response
1. "On June 10, 1986, Debtor filed his plan of reorganization." (Petition, p. 8)	Misleading -- Petitioner fails to state that his plan of reorganization was filed without a disclosure statement. Therefore, the filing of the plan served little or no purpose.
2. "On December 1, 1987, FLB objected to Debtor's disclosure statement, even though it had settled and withdrawn it's motion for relief from stay on August 31, 1987." (Emphasis added.) (Petition, pp. 9-10)	Misleading -- There is absolutely no relevance between FCB's objection to a disclosure statement and the resolving of a motion for relief from stay.
3. "[O]n February 29, 1988, a hearing on value was held and FLB was to submit an agreed order." (Petition, p. 10)	Misleading -- An agreed order was to be submitted by the parties. FCB transmitted a proposed agreed order to James Truax, one of Petitioner's attorneys. The agreed order was never returned to counsel for FCB.

4. "[A] dispute as to land valuation arose on the property upon which Grant County Bank had a lien." (Petition, p. 11)	Misleading -- Petitioner implies there was an agreement between Petitioner and Grant County Bank as to value. However, there is nothing of record indicating there was ever an agreement between Grant County Bank and Petitioner as to an agreed value.
5. "On January 25, 1989, the Bankruptcy Court held a hearing on the Plan, but there had been confusion as whether the Disclosure Statement had been approved, since creditors' consent to the required modification could not be obtained." (Petition, p. 11)	Misleading -- The only confusion was on the part of Petitioner. Furthermore, Petitioner ignores the fact that he failed to transmit the amended plan of reorganization and the disclosure statement to the creditors as ordered by the Court. See discussion in FCB's brief at V.L. and V.N.
6. "The confusion was no fault of Debtors, and the confusion was shared. Kevin Coffey, attorney for Farm Credit Bank, at one point even informed Debtor's counsel that there was no hearing scheduled for January 25, 1989." (Petition, pp. 11-12)	False and misleading -- Petitioner was the only one confused. Kevin Coffey did not advise Petitioner's counsel that there was no hearing scheduled for January 25, 1989. Furthermore, even if Mr. Coffey had made such a representation (which he did not), it would not have

	prejudiced Debtor's counsel. According to Petitioner's counsel, the alleged misrepresentation by Mr. Coffey was made on Friday, January 20, 1989. See transcript of hearing conducted on January 25, 1989, p. 15. The Bankruptcy Court had already ordered that the amended plan of reorganization and disclosure statement were to be mailed to creditors no later than December 30, 1988 (which Petitioner's counsel failed to mail). See discussion in FCB's brief at V.L. and V.N. Furthermore, Petitioner's counsel obviously knew of the hearing scheduled for Wednesday, January 25, 1989, since he was present for the hearing.
7. "Where there were four lawyers before, there was now only one -- William L. Needler." (Petition, p. 13)	Misleading -- Throughout the Bankruptcy Case, and as recently as the filing of Petitioner's Reply Brief with the Tenth Circuit Court of Appeals, Mr. Needler has indicated that Bruce Hammer of

	Blackwell, Oklahoma, is co-counsel with Mr. Needler in this litigation. There is no explanation by Petitioner or Mr. Needler as to why Mr. Hammer, the co-counsel, was not available to represent Petitioner's interest.
8. "On February 14, 1989, the Bankruptcy Court filed its Order on motions to dismiss (A. 40), holding that Debtor's dilatory and contumacious conduct over the course of the proceeding required dismissal with prejudice." (Petition, p. 13)	False -- The Bankruptcy Court's Order on Motions to Dismiss, entered on February 14, 1989, made findings that Petitioner's actions were dilatory and contumacious. The Order on Motions to Dismiss advised Petitioner that a hearing would be conducted on February 28, 1989, at which time Petitioner was required to "show cause" as to why the bankruptcy case should not be dismissed with prejudice. As discussed above, Petitioner and his counsel failed to attend the show cause hearing scheduled for February 28, 1989. See discussion in FCB's brief at V.P. and V.Q.

9. "The Bankruptcy Court's Order was received by the Needler firm in Chicago on February 16, 1989, when most of the staff had departed and Mr. Needler was out of town." (Petition, p. 14)	Misleading -- The Order that Petitioner is referring to is the Order on Motions to Dismiss, entered by the Bankruptcy Court on February 14, 1989, in which the Bankruptcy Court states that a hearing will be conducted on February 28, 1989, two weeks later, at which time Petitioner should show the Court why the case should not be dismissed with prejudice.
10. "On February 25, 1989, it was discovered that attorney Needler could not possibly journey all the way to Oklahoma to attend the show cause hearing on Tuesday, February 28, 1989, because of a scheduling conflict and an inability to leave Chicago for long at this critical time for the Needler firm." (Petition, p. 15)	Misleading -- Mr. Needler could have at least advised the Bankruptcy Court or counsel for the creditors by telephone on Monday, February 27, 1989, that he would not be able to attend the hearing. Mr. Needler failed to provide even this minor courtesy.

11. "Accordingly, on Sunday, February 26, 1989, attorney Needler requested the Bankruptcy Court by Express Mail to postpone the hearing, which was received by it on February 27, 1989." (Petition, p. 15)	Misleading -- Needler may have transmitted an application by Express Mail which was received by the Bankruptcy Court (or the clerk's office) at some time on February 27, 1989. However, the hearing to show cause was scheduled for the next morning at 9:30 a.m. Petitioner's counsel did not make any efforts to contact counsel for the creditors or the Bankruptcy Court by telephone prior to the scheduled "show cause" hearing. Furthermore, the application did not even include a signed Order by Petitioner's counsel. See Order on Motions to Dismiss.
12. "The debtor did not wait nine months to file an initial plan of reorganization. The debtor was forced to wait. There is no specific time requirement for submitting a plan and disclosure statement." (Petition, pp. 28-29)	False -- Petitioner filed a plan of reorganization on June 10, 1986. On August 4, 1986, the Bankruptcy Court ordered Petitioner to file a disclosure statement by August 20, 1986. Petitioner did not file the disclosure statement until September 15, 1987, over a year later.

13. "The early stages of the case were consumed by dilatory motion practice of creditors seeking relief from the automatic stay." (Petition, p. 29)	False -- There is nothing in the record to evidence that the creditors engaged in "dilatory motion practice". The actions taken by the creditors were to protect their rights and were permitted by the Bankruptcy Code.
14. "The bankruptcy court has neglected to mention, and so has the district court and the Court of Appeals, that the bankruptcy court granted relief from stay on a technicality to FLB." (Petition, p. 29)	Misleading -- FCB was granted relief from stay because Petitioner failed to timely file an objection and request for hearing to FCB's motion for relief from stay.
15. "There was no delay whatever except that caused by the creditors. What then transpired, for the next year and one-half is related at pages 9 through 17 of this petition. None of these facts give rise to bad faith on the part of Debtor." (Petition, pp. 30-31)	False -- Petitioner's failures and delays described in the brief to which this schedule is attached give rise to bad faith.

16. "At no time did the creditors move to strike the Plan for failure of consummation, for everyone, including the Court, was hopeful that Debtor could reorganize by agreement of the parties." (Petition, p. 31)	False -- On June 30, 1987, FCB filed a motion to dismiss the Bankruptcy Case on the grounds, inter alia, that Petitioner showed an inability to effectuate a plan of reorganization. FCB's motion to dismiss was voluntarily withdrawn, without prejudice, after Petitioner filed his amended plan of reorganization and disclosure statement. On September 30, 1988, FCB again filed a motion to dismiss the Bankruptcy Case on the grounds, inter alia, that Petitioner had shown an inability to effectuate a plan. FCB's motion to dismiss was heard before the Court on December 13, 1988, and denied without prejudice. On January 24, 1989, FCB filed its third motion to dismiss, on the grounds, inter alia, that Petitioner had shown an inability to effectuate a plan.

17. "This was a case where selfish creditors demanded additional valuations as the farm economy improved." (Petition, p. 31)	False -- Not only is this statement false, it is apparently some attempt by Petitioner to shift the attention from Petitioner's obvious attempts to abuse the bankruptcy system, to victimized creditors which were (and continue to be) subjected to bad faith, dilatory and often meritless litigation.
18. "The creditors were not prejudiced by any delay, they were materially assisted -- and they were in fact a principal cause of delay."	False -- To say that creditors have not been prejudiced by Petitioner's obvious tactics is ludicrous. The record is clear that it was Petitioner who caused the delay.
19. "Perhaps most egregious is the failure of the bankruptcy court to allow further time for a show cause hearing when the Needler firm was failing and had closed down its Chicago office."	Misleading -- The Bankruptcy Court might have allowed a continuance had Petitioner's counsel taken the time and shown the courtesy to telephone the Bankruptcy Court or counsel for the creditors.

20. "It is untrue Debtor "disobeyed" court orders. Debtor does not have to "obey" court orders which he has obtained that are no longer viable because the circumstances have changed -- creditors wouldn't agree as indicated or promised." (Petition, p. 33)	False -- The Bankruptcy Court described Petitioner's conduct as having "established a clear record of delay and contumacious conduct." The history of this case, as reflected by the record, confirms this description to be correct.
21. "It was alleged that failure to file monthly operating statements is a reason for prejudicial dismissal. However, the creditors neglect to mention that they didn't even notice their absence -- for the simple reason that small farmers do not have the accounting capabilities that other enterprises have, and there is little to report until the harvest is in and the profit is made." (Petition, pp. 33-34)	False -- On December 13, 1988, during a hearing, FCB advised the Bankruptcy Court that the Debtor had failed to file monthly reports since July of 1987.

22. "It is, of course, irrelevant at this point what the allegations of bad faith are because they are unproven -- the Court of Appeals has reversed and may not borrow findings below regarding another matter to infer bad faith sufficient to prevent the dischargeability of debt in another proceeding."	False -- See discussion in FCB's brief at VII.A.4.

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NO. 91-733

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

RANDY ARDEN FRIEOUF,

Petitioner

versus

UNITED STATES OF AMERICA, and FARM CREDIT BANK,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX OF RESPONDENT
FARM CREDIT BANK

11 U.S.C. § 523(a) and (c)

EXCEPTIONS TO DISCHARGE

(a) A discharge under Section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --

(1) for a tax or a customs duty --

(A) of the kind and for the periods specified in Section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required --

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by --

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing --

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit

Protection Act (15 U.S.C. 1601 et seq.);

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit --

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that --

(A) such debt is assigned to another entity, voluntarily, by

operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty --

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless --

(A) such loan first became due before five years (exclusive of any applicable suspension of the repayment

period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union; or

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise

be terminated due to any act of such agency.

* * * * * *

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

11 U.S.C. § 727

DISCHARGE

(a) The court shall grant the debtor a discharge, unless --

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed --

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case --

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case --

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371 or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least --

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all

debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if --

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge --

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of --

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

11 U.S.C. § 1141

EFFECT OF CONFIRMATION

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan --

> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not --

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if --

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(3)

No. 91-733

In the Supreme Court of the United States

OCTOBER TERM, 1991

RANDY ARDEN FRIEOUF, PETITIONER

v.

UNITED STATES OF AMERICA
AND FARM CREDIT BANK OF WICHITA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in light of petitioner's contumacious conduct and violation of court orders, the bankruptcy court properly dismissed petitioner's Chapter 11 case with prejudice under 11 U.S.C. 349(a) and denied petitioner a discharge of the debts at issue in this case for a three-year period.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A30) is reported at 938 F.2d 1099. The district court (Pet. App. A30-A39) and bankruptcy court opinions (Pet. App. A40-A62, A62-A69) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1991. The petition for a writ of certiorari was filed on October 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 20, 1985, petitioner filed a petition under Chapter 11 of the Bankruptcy Code. Pet. App. A3. For nine months after the petition was filed, petitioner did not submit a plan of reorganization. When he did submit his plan, petitioner failed to accompany it with the disclosure statement required by 11 U.S.C. 1125(b). Pet. App. A40. The bankruptcy court ordered petitioner to file a disclosure statement by August 20, 1986. Petitioner failed to do so. *Id.* at A5.

In June 1987, the Federal Land Bank of Wichita (FLB) filed a motion to dismiss, citing, among other grounds, petitioner's failure to file a disclosure statement or to prosecute this matter diligently. After the bankruptcy court set a hearing on that motion, petitioner filed an amended plan of reorganization and disclosure statement on September 15, 1987. FLB's motion was withdrawn without prejudice, and a hearing was set to consider approval of the disclosure statement. The hearing was held on December 8, 1987, and petitioner was ordered to amend his statement within thirty days. FLB was to have ten days to review the amended statement. If there were no objections, an agreed order was to be presented to the court. No agreed order was submitted. Pet. App. A6.

Respondent Farm Credit Bank (FCB), FLB's successor,[1] then renewed its motion to dismiss. Confronted with that motion, on November 17, 1988, petioner filed an amended disclosure statement and a third plan of reorganization. On December 13, 1988, the bankruptcy court denied FCB's motion, again

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[1] FLB had merged with the Federal Intermediate Credit Bank of Wichita to form respondent Farm Credit Bank. See Farm Credit Bank Br. in Opp. 2.

without prejudice, and approved petitioner's disclosure statement as modified. A hearing on confirmation of the plan was set for January 25, 1989. Pet. App. A7-A8.

At the January 25, 1989, hearing, the court learned that petitioner had never mailed his plan of reorganization nor his disclosure statement to creditors. The court then took FCB's renewed motion to dismiss under advisement and allowed petitioner time to file a response. Pet. App. A8.

2. On February 14, 1989, the bankruptcy court entered an order concluding that dismissal with prejudice was warranted. Pet. App. A40-A62. The court noted that petitioner and his counsel had made "little or no apparent effort * * * to formulate a confirmable plan of reorganization," and observed that "the only plans which have been filed have been filed solely to create an argument in opposition to various motions seeking to terminate the proceeding." *Id.* at A50. The court rejected petitioner's contention that his "numerous failures to comply with orders of the court" resulted from misunderstandings, commenting that such misunderstandings "would only be possible if counsel were unable to communicate in the English language." *Id.* at A57-A58. Noting "the almost unbelievably lengthy record of proceedings in this case," the court concluded that the requirements for a dismissal with prejudice were satisfied. *Id.* at A60. But because the court had previously indicated that it did not believe that such a dismissal was warranted, the court gave petitioner a final opportunity to show cause why a dismissal with prejudice should not be entered. A hearing was set for February 28, 1989. *Id.* at A61.

Petitioner failed to appear at the February 28 show-cause hearing.[2] The court accordingly dismissed the case with prejudice. Because petitioner had expressed his intention to refile under Chapter 12 if the Chapter 11 case were dismissed, the court also barred petitioner from filing any bankruptcy petition for three years. Pet. App. A62-A69.

3. The district court affirmed the bankruptcy court's order of dismissal, noting that the record reveals that petitioner's actions were "characterized by delay, inefficiency, dilatory tactics, failure to obey orders of court, and unprofessional and recalcitrant behavior." Pet. App. A33.

4. The court of appeals affirmed the dismissal with prejudice, holding that under 11 U.S.C. 349(a) the bankruptcy court has the power to deny "a debtor future discharge of debts dischargeable in that particular case." Pet. App. A16. After reviewing the bankruptcy court's factual findings, the court of appeals concluded that the record supported dismissal of the bankruptcy case with prejudice and the order making nondischargeable for three years the debts of petitioner that were dischargeable in this case. *Id.* at A27-A29. The court, however, reversed the bankruptcy court's denial to petitioner of all access to bankruptcy relief for three years. The court held that the bankruptcy court could not prevent a debtor from refiling a bankruptcy petition for more than 180 days, the time period contained in 11 U.S.C. 109(g).

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[2] Petitioner had sought to continue the show-cause hearing and had filed a motion, which failed to conform to local rules, seeking reconsideration of the bankruptcy court's February 14 order.

ARGUMENT

1. Petitioner contends (Pet. 18-28) that the bankruptcy court lacked authority under 11 U.S.C. 349(a) to deny discharge of the dischargeable debts involved in this case for three years. That contention is incorrect, and petitioner makes no claim that the court of appeals' decision conflicts with the decision of another court of appeals. Further review is therefore not warranted.

Section 349(a) grants the bankruptcy court discretion to dismiss a case with prejudice. It states, in pertinent part, that:

> [u]nless the court, for cause, orders otherwise, the dismisal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed.

11 U.S.C. 349(a).[3] By expressly authorizing the bankruptcy court to bar the discharge of debts in a subsequent bankruptcy proceeding "for cause," the section creates an exception to the general rule that dismissal does not affect dischargeability. Giving the text its natural meaning, the court of appeals correctly found that Section 349(a) empowers the bankruptcy court to deny "a debtor future discharge of debts dischargeable in that particular case." Pet.

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[3] The section continues by stating: "nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in Section [109(g)] of this title." Petitioner does not contend, nor does the language of this provision suggest, that the 180-day time limitation in Section 109(g) applies to the portion of the section concerning dischargeability, which precedes the semicolon.

App. A16. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, that statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' "); *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2199 (1991) ("In our view, the plain language of the Bankruptcy Code disposes of the question before us."). Thus, while reversing the bankruptcy court's denial of all access to the bankruptcy courts for three years, the court of appeals properly sustained, as a legitimate exercise of the bankruptcy court's power, the lesser sanction of rendering the debts that were dischargeable in this case nondischargeable for three years upon a finding that there was "cause" for that sanction.

Petitioner asserts (Pet. 22-23) that Section 349(a)'s purpose is to "prevent[] already non-dischargeable debts from being asserted in a subsequent proceeding." The plain language of the provision, however, refutes that claim; the provision applies to the discharge of "debts that were *dischargeable* in the case dismissed" (emphasis added). Nor is petitioner correct in arguing (Pet. 23) that the "for cause" reference in Section 349(a) limits the court to finding "cause" to deny dischargeability under 11 U.S.C. 1141, 11 U.S.C. 523, or 11 U.S.C. 727. If Congress had intended that result, it would have mentioned or otherwise identified those particular sections in Section 349(a), but there is no such cross-reference. Petitioner cites no evidence that those sections were intended to limit the court's independent power to require a dismissal with prejudice under Section 349(a) upon a sufficient showing of "cause."

It is no surprise that Section 349(a) does not take its content from the cited provisions, since none of them deals with dismissals. Section 1141, 11 U.S.C.

1141, describes the effect of confirmation of a plan. It does not apply where, as here, no plan was confirmed at all (which will often be true when a petition is dismissed for cause). Section 525, 11 U.S.C. 523, describes general exceptions to discharge of particular debts. It would be redundant to apply the standards of that section to the "cause" determination under Section 349(a); even without an order entered for "cause" under Section 349(a), items covered by Section 523 would not be dischargeable. Finally, Section 727, 11 U.S.C. 727, generally states that a discharge of debts shall be granted unless certain circumstances are shown; it does not speak to the issue of whether a debtor may be temporarily denied access to discharge when a dismissal of the petition is entered for cause.[4]

2. Petitioner also argues (Pet. 28-35) that the record in this case did not establish the bad faith needed to support the bankruptcy court's order. That fact-bound issue warrants no review here, and, in any event, the record supports the result in this case.

Petitioner failed to submit a disclosure statement for more than a year after the filing deadline set by the court. Pet. App. A41. He then submitted amended plans of reorganization only after creditors had filed motions to dismiss based on his failure to provide a feasible reorganization plan. *Id.* at A41-A44, A50. He disregarded a court order to submit an amended reorganization plan and disclosure statement to the creditors. *Id.* at A44-A45. He repeatedly failed to file monthly operating statements, despite

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[4] Even if Section 727 did apply in this case, it would not aid petitioner. Under Section 727(a)(6), discharge may be denied if "the debtor has refused, in the case—(A) to obey any lawful order of the court." Petitioner repeatedly did so here.

court orders. *Id.* at A46-A47. Finally, petitioner did not appear at a scheduled hearing to show why the case should not be dismissed with prejudice. *Id.* at A64. Against that background, the court of appeals did not err in finding the sanction imposed on petition to be fully warranted.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] In passing, petitioner suggests (Pet. 25) that his due process rights were infringed by the court of appeals' failure to order an additional hearing in the bankruptcy court on the issue of bad faith. The bankruptcy court, however, had already made factual determinations that the debtor disregarded court orders, failed to make required filings, and unreasonably delayed the case to the detriment of the creditors. Pet. App. A50, A56-A58. As the court of appeals correctly found, these factual findings, which petitioner had an ample opportunity to contest, were sufficient to support the dismissal with prejudice. *Id.* at A27.

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